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## **USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): A Legal Analysis of the Conference Bill**

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# **USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): A Legal Analysis of the Conference Bill**

## **Summary**

The USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, as reported by the Conference Committee, H.Rept. 109-333 (2005), consists of seven titles.

Among other things, Title I makes permanent 14 USA PATRIOT Act sections scheduled to expire on February 3, 2006 as well as the terrorism support amendments scheduled to expire on December 31, 2006. It amends and postpones until December 31, 2009 the expiration of the act's sections 206 and 215 relating to Foreign Intelligence Surveillance Act (FISA) orders for roving wiretaps and access to business records. It extends the temporary FISA "lone wolf" provision to the same date. It clarifies and amends the "National Security Letter" statutes in a manner designed to ensure their constitutional viability and for other purposes. It authorizes court orders approving wiretapping in the course of investigations of a number of terrorism-related offenses.

As for other proposals reported out of conference, Title II revives the death penalty as a sentencing option for air piracy murders committed between 1974 and 1994, permits certain terrorists to be sentenced to a lifetime of supervision following their release from prison, and eliminates the redundant capital punishment procedures found in the Controlled Substances Act. It does not include the other capital punishment adjustments found in the bill which the House sent to conference. Title III carries forward the anti-terrorism, anti-crime proposals found in a separate free-standing seaport protection bill. Title IV reflects in modified form House and Senate suggestions for amending federal confiscation laws and other money laundering adjustments.

Titles V and VI of the Conference bill contain provisions added in conference and not previously included in either House or Senate version of H.R. 3199, some of which — like the habeas amendments in the case of state death row inmates, the adjustments in the role of the Office of Intelligence Policy and Review in the FISA process, or the new Secret Service offenses — may prove controversial. Title VII, likewise inserted by the conferees, follows the course of separate bills considered in the House and Senate that seek to curtail illicit methamphetamine production and its consequences through grant programs, enhanced criminal penalties, and preventing the diversion of over-the-counter cold remedies and other sources of precursor chemicals for use in illegal manufacturing.

## Contents

Introduction .....	1
Section 1. Short Title and Table of Contents .....	1
Title I: USA PATRIOT Improvement and Reauthorization Act .....	1
Section 101. References to, and Modification of Short Title for, USA PATRIOT Act .....	1
Section 102. USA PATRIOT Act Sunset Provisions .....	2
Section 103. Extension of Sunset Relating to Individual Terrorists as Agents of Foreign Powers .....	2
Section 104. Section 2332b and the Material Support Sections of Title 18, U.S. Code .....	2
Section 105. Duration of FISA Surveillance of Non-U.S. Persons Under Section 207 of the USA PATRIOT Act .....	3
Section 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act .....	3
Section 106A. Audit on Access to Certain Business Records for Foreign Intelligence Purposes .....	7
Section 107. Enhanced Oversight of Good-Faith Emergency Disclosures Under Section 212 of the USA PATRIOT Act .....	7
Section 108. Multipoint Electronic Surveillance Under Section 206 of the USA PATRIOT Act .....	8
Section 109. Enhanced Congressional Oversight .....	11
Section 110. Attacks Against Railroad Carriers and Mass Transportation Systems .....	11
Section 111. Forfeiture .....	12
Section 112. Section 2332b(g)(5)(B) Amendments Relating to the Definition of Federal Crime of Terrorism .....	12
Section 113. Amendments to Section 2516(1) of Title 18, United States Code .....	13
Section 114. Delayed Notice Search Warrants .....	13
Section 115. Judicial Review of National Security Letters .....	15
Section 116. Confidentiality of National Security Letters .....	18
Section 117. Violations of Nondisclosure Provisions of National Security Letters .....	18
Section 118. Reports on National Security Letters .....	18
Section 119. Audit of Use of National Security Letters .....	19
Section 120. Forfeiture for Acts of Terrorism .....	19
Section 121. Cigarette Smuggling .....	20
Section 122. Narco-Terrorism .....	20
Section 123. Interfering With the Operation of An Aircraft .....	22
Section 124. Investigation of Political Activities .....	22
Section 125. Immunity for Fire Equipment Donors .....	22
Section 126. Federal Data Mining Report .....	22
Section 127. Victims Access Forfeiture Funds .....	23
Section 128. Information Related to FISA Pen Register .....	23
Title I House Proposals Dropped in Conference .....	25
Title II: Terrorist Death Penalty Enhancement .....	26
Section 201. Short Title .....	26
Section 211. Pre-1994 Capital Air Piracy Cases .....	26

Section 212. Life Time Supervised Release Regardless of Risks .....	28
Section 221. Capital Procedures in Drug Cases .....	28
Section 222. Appointment of Counsel in Capital Cases .....	29
Title II House Proposals Dropped in Conference .....	29
Title III: Seaport Terrorism .....	30
Section 301. Short Title .....	30
Section 302. Seaport Entry by False Pretenses .....	30
Section 303. Obstructing Maritime Inspections .....	32
Section 304. Interference with Maritime Commerce .....	32
Section 305. Transporting Dangerous Materials or Terrorists .....	33
Section 306. Interference With Maritime Navigation .....	34
Section 307. Theft From Maritime Commerce .....	37
Section 308. Stowaways .....	38
Section 309. Port Security Bribery .....	38
Section 310. Smuggling Goods Into the United States .....	38
Section 311. Smuggling Goods From the United States .....	38
Title III House Proposals Dropped in Conference .....	39
Title IV: Terrorism Financing .....	39
Section 401. Short Title .....	40
Section 402. International Emergency Economic Powers Act	
Penalties .....	40
Section 403. Terrorist Money Laundering .....	40
Section 404. Forfeiture for Foreign Crimes .....	42
Section 405. Application of the Money Laundering Statute to	
Dependent Transactions .....	43
Sections 406-408. Technical Amendments .....	44
Section 406. Civil Forfeiture Pre-trial Freezes and Restraining	
Orders .....	45
Section 406. Conspiracy Penalties .....	45
Section 409. Laundering the Proceeds Foreign Terrorist Training ..	45
Section 410. Uniform Procedures for Criminal Forfeitures .....	46
Title V: Miscellanea .....	47
Section 501. Justice Department Residency Requirements .....	48
Section 502. Appointment of U.S. Attorneys .....	48
Section 503. Presidential Succession: Homeland Security Secretary ..	48
Section 504. Confirmation of the Director of BATFE .....	48
Section 505. Qualifications for U.S. Marshals .....	48
Section 506. New Assistant Attorney General for National Security ..	50
Section 507. Habeas Corpus in State Capital Cases .....	52
Title VI: Secret Service .....	54
Section 601. Short Title .....	54
Protection of the President and Certain Other Federal Officials .....	55
Special Events of National Significance .....	56
Title VII: Methamphetamine .....	61
Subtitle VII A: Precursors .....	61
Subtitle VII B: International Regulation of Precursors .....	65
Subtitle VII C: Enhanced Penalties .....	66
Subtitle VII D: Enhanced Cleanup Regulation .....	67
Subtitle VII E: Drug Courts and Grant Programs .....	68

# **USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): Legal Analysis of the Conference Bill**

## **Introduction**

This report provides a section-by-section summary and analysis of the seven titles of the Conference bill accompanying the USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199).<sup>1</sup>

### **Section 1. Short Title and Table of Contents.**

The short title of the act may be cited as the “USA PATRIOT Improvement and Reauthorization Act of 2005.”

## **Title I: USA PATRIOT Improvement and Reauthorization Act**

Title I is in many ways the heart of the Conference bill. It makes permanent most of the USA PATRIOT Act sections initially scheduled to expire on December 31, 2005 and extended until February 3, 2006. To several, like section 215, it adds safeguards. It addresses issues raised by USA PATRIOT Act sections other than those for which the sun is setting. It more clearly states the “National Security Letter” provisions of law, in ways perhaps necessary to make them constitutionally viable. Elsewhere it looks at the issues faced in the USA PATRIOT Act four years after the fact. In some instances it adds to the tools available; in others it adds further checks against abuse.

### **Section 101. References to, and Modification of Short Title for, USA PATRIOT Act.**

This section explains that references contained in this act are deemed to refer to P.L. 107-56, the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001.”

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<sup>1</sup> Related CRS Reports by the authors from which portions of this report have been drawn include CRS Report RL33210, *USA PATRIOT Improvement and Reauthorization Act of 2005(H.R. 3199): A Side-by-Side Comparison of Existing Law, H.R. 3199(Conference), and H.R. 3199 (Senate Passed)*; CRS Report RS22348, *USA PATRIOT Improvement and Reauthorization Act of 2005(H.R. 3199): A Brief Look*; and CRS Report RL33027, *USA PATRIOT Act: Background and Comparison of House- and Senate-Approved Reauthorization and Related Legislative Action*.

## **Section 102. USA PATRIOT Act Sunset Provisions.**

This section repeals section 224 of the USA PATRIOT Act that had mandated certain sections of the act to expire on December 31, 2005.<sup>2</sup> The section adopts a sunset of December 31, 2009, for section 206 (regarding Foreign Intelligence Surveillance Act (FISA) court orders for multipoint, or “roving,” wiretaps) and section 215 (access to business records requested under FISA).

## **Section 103. Extension of Sunset Relating to Individual Terrorists as Agents of Foreign Powers.**

This section postpones the expiration of section 6001(b) of the Intelligence Reform and Terrorism Prevention Act (IRTPA) from December 31, 2005 until December 31, 2009.<sup>3</sup> Section 6001(b) defines an “agent of a foreign power” to include any person, other than a United States person, who “engages in international terrorism or activities in preparation therefore.”<sup>4</sup> Thus, so-called “lone wolf” terrorists may be subjected to foreign intelligence surveillance despite not being an agent of a foreign power or an international terrorist organization.<sup>5</sup>

## **Section 104. Section 2332b and the Material Support Sections of Title 18, U.S. Code.**

Section 6603 of the IRTPA is made permanent by repealing a sunset provision that would have caused the section to be ineffective on December 31, 2006. Section 6603 of IRTPA amends federal law regarding material support of terrorists and terrorist organizations, primarily in 18 U.S.C. 2339A<sup>6</sup> and 2339B.<sup>7</sup> Briefly,<sup>8</sup> section 6603: (1) amends the definitions of “material support or resources,” “training,” and “expert advice or assistance” as those terms are used in 18 U.S.C. 2339A and 2339B, and of “personnel” as used in section 2339B; (2) adds a more explicit knowledge requirement to section 2339B; (3) expands the extraterritorial jurisdiction reach of

<sup>2</sup> On December 22, 2005, Congress enacted P.L. 109-160 (S. 2167) that amended section 224(a) of the USA PATRIOT Act to extend the sunset to February 3, 2006.

<sup>3</sup> S. 2167 also extended the original sunset of the lone wolf provision of the IRTPA to February 3, 2006.

<sup>4</sup> 50 U.S.C. 1801(b)(1)(C).

<sup>5</sup> For more information on the “lone wolf” amendment, see CRS Report RS22011, *Intelligence Reform and Terrorism Prevention Act of 2004: “Lone Wolf” Amendment to the Foreign Intelligence Surveillance Act*, by Elizabeth B. Bazan.

<sup>6</sup> Section 2339A outlaws providing, attempting to provide, or conspiring to provide, material support or resources for the commission of any of several designated federal crimes that a terrorist might commit.

<sup>7</sup> Section 2339B outlaws providing, attempting to provide, or conspiring to provide, material support or resources to a designated foreign terrorist organization.

<sup>8</sup> For more information regarding section 6603 of IRTPA, see CRS Report RL33035, *Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments*, by Charles Doyle.

section 2339B; (4) enlarges the list of federal crimes of terrorism, 18 U.S.C. 2332b(g)(5); (5) adds the enlarged list to the inventory of predicate offenses for 18 U.S.C. 2339A (material support for the commission of certain terrorist crimes) and consequently for 18 U.S.C. 2339B (material support for designated terrorist organizations); and (6) precludes prosecution for certain violations committed with the approval of the Secretary of State and concurrence of the Attorney General.

### **Section 105. Duration of FISA Surveillance of Non-U.S. Persons Under Section 207 of the USA PATRIOT Act.**

This section extends the maximum duration of FISA surveillance and search orders against any agent of a foreign power who is not a U.S. person (e.g., a lone wolf terrorist), by amending section 105(e) of FISA.<sup>9</sup> Initial orders authorizing such searches may be for a period of up to 120 days, with renewal orders permitted to extend the period for up to one year. In addition, this section extends the life time for both initial and extension orders authorizing installation and use of FISA pen registers, and trap and trace surveillance devices from a period of 90 days to one year, in cases where the government has certified that the information likely to be obtained is foreign intelligence information not concerning a U.S. person.

### **Section 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act.**

Section 215 amended the business record sections of FISA to authorize the Director of the Federal Bureau of Investigations (FBI) or a designee of the Director, to apply to the FISA court to issue orders granting the government access to any tangible item (including books, records, papers, and other documents), no matter who holds it, in foreign intelligence, international terrorism, and clandestine intelligence cases. Section 215 authority appears to have been relatively little used. In April 2005, Justice Department officials testified to the House Judiciary Committee that, as of March 31, 2005, only 35 orders have been issued under section 215 authority, none of which involved library, book store, medical, or gun sale records.<sup>10</sup> At the same time, they argue against the creation of a safe haven in public services that

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<sup>9</sup> Codified at 50 U.S.C. 1805(e) and 50 U.S.C. 1824(d).

<sup>10</sup> *Oversight Hearing on the “Implementation of the USA PATRIOT Act: Foreign Surveillance Intelligence Act (FISA)”*: Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 109th Cong., 1st Sess. (2005) (statement of Kenneth L. Wainstein, U.S. Attorney for the District of Columbia), at 8, available on Jan. 13, 2006 at [http://judiciary.house.gov/media/pdfs/wainstein042805.pdf].

terrorists have been known to use.<sup>11</sup> The Conference bill contains several provisions to guard against abuses of section 215 authority.

**Enhanced Oversight.** Section 106(a)(2) of the Conference bill adds 50 U.S.C. 1861(a)(3), requiring that an application for a section 215 FISA order (“215 order”) for the production of certain sensitive categories of records, such as library, bookstore, firearm sales, tax return, educational, and medical records, must be personally approved by one of the following three high-level officials: the FBI Director, the FBI Deputy Director, or the Executive Assistant Director for National Security. This provision was included as an attempt to allay concerns over federal authorities abusing section 215 authority to obtain sensitive types of records.<sup>12</sup>

In addition, the Attorney General must submit to Congress an annual report regarding the use of section 215 authority. This report is to be filed with the House and Senate Committees on the Judiciary, the House Permanent Select Committee on Intelligence, and the Senate Select Committee on Intelligence. Section 106(h)(2) of the Conference bill amends 50 U.S.C. 1862 to require that the annual report contain the following information regarding the preceding year:

- the total number of applications made for 215 orders approving requests for the production of tangible things,
- the total number of such orders granted as requested, granted as modified, or denied, and
- the number of 215 orders either granted, modified, or denied for the production of each of the following: library circulation records, library patron lists, book sales records, or book customer lists; firearms sales records; tax return records; educational records; and medical records containing information that would identify a person.

Current law requires public disclosure of only the first two items above; by adding the third reporting requirement, the Conference bill provides for a more detailed

<sup>11</sup> *Oversight Hearing on the “Implementation of the USA PATRIOT Act: Foreign Surveillance Intelligence Act(FISA)”*: Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 109th Cong., 1st Sess. (2005) (statement of James A. Baker, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Dep’t of Justice), at 3, available on Jan. 13, 2006 at [<http://judiciary.house.gov/media/pdfs/baker042805.pdf>] (“While section 215 has never been used to obtain such records, last year, a member of a terrorist group closely affiliated with al Qaeda used Internet service provided by a public library to communicate with his confederates. Furthermore, we know that spies have used public library computers to do research to further their espionage and to communicate with their co-conspirators . . . A terrorist using a computer in a library should not be afforded greater privacy protection than a terrorist using a computer in his home.”).

<sup>12</sup> 50 U.S.C. 1861(a)(2)(B) already prohibits the government from seeking a section 215 order in an investigation of a U.S. person solely upon the basis of activities protected by the First Amendment to the U.S. Constitution. For more information about section 215 under existing law and its potential use against libraries or their patrons, see CRS Report RS21441, *Libraries and the USA PATRIOT Act*, by Charles Doyle and Brian T. Yeh.

account of whether and when section 215 authority has been used to request these categories of sensitive information.

**Minimization Procedures.** Not later than 180 days after the date of the enactment of the act, the Attorney General is required to promulgate specific minimization standards that apply to the collection and dissemination of information obtained through the use of the section 215 authority.<sup>13</sup> These procedures are intended to limit the retention, and regulate the dissemination, of nonpublicly available information concerning unconsenting U.S. persons, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.<sup>14</sup> Federal authorities are directed to observe these minimization procedures regarding the use or disclosure of information received under a 215 order; furthermore, they may not use or disclose such information except for lawful purposes.<sup>15</sup> Finally, section 106(g) of the Conference bill clarifies that otherwise privileged information does not lose its privileged character simply because it was acquired through a 215 order.

**Application Requirements.** Current law only requires that an application for a 215 order state that the requested records are sought for an authorized investigation. The Conference bill amends 50 U.S.C. 1861(b)(2) to clarify that such an application must include a “statement of facts” demonstrating that there are reasonable grounds to believe that the tangible things sought are “relevant” to an authorized or preliminary investigation to protect against international terrorism or espionage, or to obtain foreign intelligence information not concerning a U.S. person. Section 106(b)(2)(A) of the Conference bill also provides that certain tangible items are “presumptively relevant” to an investigation if the application’s statement of facts shows that the items sought pertain to:

- a foreign power or an agent of a foreign power,
- the activities of a suspected agent of a foreign power who is the subject of such authorized investigation, or
- an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation.

The “relevancy” standard set forth in the Conference bill has been criticized.<sup>16</sup> The Senate-passed version of the USA PATRIOT Improvement and Reauthorization

<sup>13</sup> Proposed 50 U.S.C. 1861(g)(1).

<sup>14</sup> Proposed 50 U.S.C. 1861(g)(2)(A).

<sup>15</sup> Proposed 50 U.S.C. 1861(h).

<sup>16</sup> 151 CONG. REC. S13475-476 (daily ed. Dec. 13, 2005) (statement of Sen. Feingold) (“The additional item put in the conference report is the loophole, the exception, that swallows that three-part test. It does not require the connection to the terrorist or spy, even though this legislation, from the very outset, was supposed to be a response to what happened on 9/11, to terrorism. This does gut the changes to section 215 that are in the Senate bill.”).

Act, S. 1389,<sup>17</sup> requires that the statement of facts show that the records or things sought are relevant to an authorized investigation *and* that the things sought pertain to, or are relevant to the activities of, a foreign power or agent of foreign power, or pertain to an individual in contact with or known to a suspected agent of a foreign power. The Conference bill does not require such a connection.

The application for a 215 order must also include an enumeration of the minimization procedures applicable to the retention and dissemination of the tangible items sought.<sup>18</sup>

**Approval of 215 Orders.** The FISA court judge shall approve an application for a 215 order as requested or as modified, upon a finding that the application complies with statutory requirements.<sup>19</sup> The order must contain a particularized description of the items sought, provide for a reasonable time to assemble them, notify recipients of nondisclosure requirements, and be limited to things subject to a grand jury subpoena or order of a U.S. court for production.<sup>20</sup> The ex parte order shall also direct that the retention and dissemination of the tangible things obtained under the order must adhere to the minimization procedures.

**Judicial Review and Enforcement.** Section 106(f) establishes a judicial review process for recipients of 215 orders to challenge their legality with a specified pool of FISA court judges. If the judge determines that the petition is not frivolous after an initial review, the judge has discretion to modify or set aside a FISA order upon a finding that it does not comply with the statute or is otherwise unlawful.<sup>21</sup> However, if the judge does not modify or rescind the 215 order, then the judge must immediately affirm the order and direct the recipient to comply with it.

The FISA Court of Review and the Supreme Court are granted jurisdiction to consider appeals of the FISA court judge's decision to affirm, modify, or set aside a 215 order.<sup>22</sup> The Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence, is directed to establish security measures for maintaining the record of the 215 order judicial review proceedings.<sup>23</sup>

<sup>17</sup> The Senate by unanimous consent substituted the text of S. 1389, as reported by the Judiciary Committee, after striking all but the enacting clause from H.R. 3199, 151 CONG. REC. S9559, S9562 (daily ed. July 29, 2005). The Record, however, reprints the House-passed bill and identifies it as H.R. 3199 as passed by the Senate, 151 CONG. REC. S9562-579 (daily ed. July 29, 2005). For purposes of convenience, we assume that the Senate-passed version of H.R. 3199 is S. 1389 as reported and will refer to it as S. 1389.

<sup>18</sup> Proposed 50 U.S.C. 1861(b)(2)(B).

<sup>19</sup> Proposed 50 U.S.C. 1861(c)(1).

<sup>20</sup> Proposed 50 U.S.C. 1861(c)(2).

<sup>21</sup> Proposed 50 U.S.C. 1861(f)(1). The review of a petition challenging a 215 order shall be conducted in camera, proposed 50 U.S.C. 1803(e)(2).

<sup>22</sup> Proposed 50 U.S.C. 1861(f)(2).

<sup>23</sup> Proposed 50 U.S.C. 1861(f)(3).

**Nondisclosure Requirement.** Federal law currently prohibits the recipient of a 215 order to disclose to any other person that the FBI has sought the tangible things described in the order, except to those persons necessary for compliance.<sup>24</sup> The Conference bill expressly clarifies that a recipient of a 215 order may disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI.<sup>25</sup> Although the recipient may be required to notify the FBI of those to whom they intend to disclose, the recipient is not required to inform the FBI of an intent to consult with an attorney to obtain legal assistance.<sup>26</sup>

The Conference bill does not provide an express, statutory right for a recipient of a 215 order to petition a FISA court judge to modify or quash the nondisclosure requirement. By contrast, section 115 of the Conference bill establishes the right of recipients of “national security letters” to challenge both the legality of the request as well as the gag order imposed in connection with the request.<sup>27</sup>

### **Section 106A. Audit on Access to Certain Business Records for Foreign Intelligence Purposes.**

This section is a new provision which provides for the Inspector General of the Department of Justice to conduct a comprehensive audit to determine the effectiveness, and identify any abuses, concerning the use of section 215 authority, for calendar years 2002-2006. The audit is to be performed in accordance with the detailed requirements set forth in this section. The results of the audit are to be submitted in an unclassified report to the House and Senate Committees on the Judiciary and Intelligence.

### **Section 107. Enhanced Oversight of Good-Faith Emergency Disclosures Under Section 212 of the USA PATRIOT Act.**

Section 212 of the PATRIOT Act permits electronic communications service providers to disclose voluntarily the contents of stored electronic communications to a Federal, State, or local governmental entity in emergency situations involving a risk or danger of death or serious physical injury to any person.<sup>28</sup> Service providers are also permitted to disclose customer records to governmental entities in emergencies involving an immediate risk of serious physical injury or danger of death to any person.<sup>29</sup>

To provide congressional oversight over the use of this authority, section 107(a) of the Conference bill requires the Attorney General annually to report to the

<sup>24</sup> 50 U.S.C. 1861(d).

<sup>25</sup> Proposed 50 U.S.C. 1861(d)(1)(B), (C).

<sup>26</sup> Proposed 50 U.S.C. 1861(d)(2)(C).

<sup>27</sup> Compare 50 U.S.C. 1861(f) (the section 215 FISA order judicial review provisions) with 18 U.S.C. 3511(a) and (b) (the national security letter judicial review provisions).

<sup>28</sup> 18 U.S.C. 2702(b)(8).

<sup>29</sup> 18 U.S.C. 2702(c)(4).

Judiciary Committees of the House and Senate concerning the number of service providers' voluntary emergency disclosures of the contents of electronic communications to the Department of Justice. The report must also summarize the basis for the voluntary disclosure in circumstances where the investigation pertaining to the disclosure was closed without the filing of criminal charges. In addition, section 107(b) removes the immediacy requirement from the customer records provision and defines "governmental entity" to mean a department or agency of the United States or any State or political subdivision thereof.

### **Section 108. Multipoint Electronic Surveillance Under Section 206 of the USA PATRIOT Act.**

Unlike a criminal wiretap order issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>30</sup> which may be approved if a judge finds probable cause for believing that an individual is committing, has committed, or is about to commit a particular enumerated offense,<sup>31</sup> a FISA wiretap may be issued upon a finding of probable cause to believe that the target of the electronic surveillance is a foreign power or agent of a foreign power.<sup>32</sup> Section 206 of the PATRIOT Act amended FISA to authorize the installation and use of multipoint, or "roving," wiretaps, for foreign intelligence investigations.<sup>33</sup> A roving wiretap order applies to the suspect rather than a particular phone or computer that the target might use, and thus allows law enforcement officials to use a single wiretap order to cover any communications device that the target uses or may use.<sup>34</sup> Without this authority, investigators must seek a new FISA court order each time they need to change the name of the location to be monitored, as well as the specified person or entity that is needed to assist in facilitating the wiretap.<sup>35</sup>

A FISA roving surveillance order must specify the identity of the target, but only if it is known; otherwise, it is sufficient for the order to describe the target.<sup>36</sup> Furthermore, a roving wiretap order need not identify the nature and location of the places or facilities targeted for surveillance if they are unknown.<sup>37</sup> Since roving

<sup>30</sup> 18 U.S.C. 2510 et seq.

<sup>31</sup> See list of predicate offenses at 18 U.S.C. 2516(1)(a)-(r).

<sup>32</sup> 50 U.S.C. 1805(a).

<sup>33</sup> 50 U.S.C. 1805(c)(2)(B).

<sup>34</sup> According to the Department of Justice, "This new authority has put investigators in a better position to avoid unnecessary cat-and- mouse games with terrorists, who are trained to thwart surveillance." U.S. Dep't of Justice, *Report from the Field, The USA PATRIOT Act at Work*, 22 (July 2004), available on Jan. 13, 2006 at [[http://www.lifeandliberty.gov/docs/071304\\_report\\_from\\_the\\_field.pdf](http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf)].

<sup>35</sup> *Oversight Hearing on "Reauthorization of the USA PATRIOT Act": Hearings Before the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of James B. Comey, Deputy Attorney General, U.S. Dep't of Justice), at 9-10, available on Jan. 13, 2006 at [<http://judiciary.house.gov/media/pdfs/comey060805.pdf>].

<sup>36</sup> 50 U.S.C. 1805(c)(1)(A).

<sup>37</sup> 50 U.S.C. 1805(c)(1)(B).

surveillance orders in foreign intelligence investigations may be approved when the government describes, rather than specifically identifies, the target of surveillance, critics of the PATRIOT Act question whether this kind of “John Doe” wiretap authority may be a “recipe for abuse.”<sup>38</sup> A Department of Justice official in testimony before Congress responded to this criticism: “It is critical, however, to keep in mind that the government’s description of the target must be sufficiently specific to convince the FISA Court that there is probable cause to believe that the target is a foreign power or agent of a foreign power.”<sup>39</sup>

Section 206 of the PATRIOT Act also permits a general command for the assistance of third parties (for example, common carriers and Internet service providers) for the installation and use of these multipoint wiretaps, where the target of the surveillance has taken steps to thwart the identification of a communications company or other person whose assistance may be needed to carry out the surveillance. Thus, if the FISA court finds that the target’s actions may have the effect of thwarting specific identification, section 206 temporarily authorizes FISA orders that need not specifically identify the communications carriers, landlords or others whose assistance the order commands.<sup>40</sup>

Critics of section 206 assert that the roving wiretap authority is too sweeping,<sup>41</sup> places unfair burdens upon those called upon to provide assistance,<sup>42</sup> and might raise

<sup>38</sup> Electronic Frontier Foundation, *Let the Sun Set on PATRIOT - Section 206: “Roving Surveillance Authority Under the Foreign Intelligence Surveillance Act of 1978,”* available Jan. 13, 2006 at [<http://www.eff.org/patriot/sunset/206.php>].

<sup>39</sup> *Oversight Hearing on the “Implementation of the USA PATRIOT Act: Foreign Surveillance Intelligence Act (FISA)”*: Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 109th Cong., 1st Sess. (2005) (statement of Kenneth L. Wainstein, U.S. Attorney for the District of Columbia), at 3, available on Jan. 13, 2006 at [<http://judiciary.house.gov/media/pdfs/wainstein042805.pdf>].

<sup>40</sup> 50 U.S.C. 1805(c)(2)(B).

<sup>41</sup> See, e.g., Electronic Privacy Information Center, *The USA PATRIOT Act (“EPIC Report”)*, available on Jan. 13, 2006 at [<http://www.epic.org/privacy/terrorism/usapatriot>] (“Such ‘generic’ orders could have a significant impact on the privacy rights of large numbers of innocent users, particularly those who access the Internet through public facilities such as libraries, university computer labs and cybercafes. Upon the suspicion that an intelligence target might use such a facility, the FBI can now monitor all communications transmitted at the facility. The problem is exacerbated by the fact that the recipient of the assistance order (for instance, a library) would be prohibited from disclosing the fact that monitoring is occurring.”).

<sup>42</sup> See, e.g., John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1105 (2002) (“This provision is problematic in that it distorts two extremely important checks in the legal system that historically have provided a measure of accountability for the validity of a warrant. First, the amendment allows the issuance of so-called ‘blank warrants,’ by which the parties required to respond to the order need not be listed on the face of the document. This places such communications providers in the position of having to accept the validity of the warrant and its application to them virtually without question... Second, the order may not have been issued in the responding party’s jurisdiction, creating hindrances of geography

constitutional concerns.<sup>43</sup> In part to address these concerns, section 108 of the Conference bill provides greater judicial and congressional oversight and other procedural requirements for multipoint electronic surveillance orders. The section amends the FISA roving surveillance authority to require that an application for an order, as well as the wiretap order itself, describe the *specific* target of the electronic surveillance if the target's identity is not known.<sup>44</sup> It also clarifies that the FISA court must find that the prospect of a target thwarting surveillance is based on specific facts in the application.<sup>45</sup> Furthermore, if the government begins to direct surveillance at a new facility or place, the nature and location of which were unknown at the time the original surveillance order was issued, the government must notify the FISA court within 10 days<sup>46</sup> after such change, of the following information:

- the nature and location of each new facility or place at which the surveillance is directed,
- the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place is or was being used, or is about to be used, by the target of the surveillance,
- an explanation of any proposed minimization procedures that differ from those contained in the original application or order, if such change is necessitated by the new facility or place, and
- the total number of electronic surveillances that have been or are being conducted under the roving surveillance order.<sup>47</sup>

The Conference bill also enhances congressional oversight over the use of all foreign intelligence electronic surveillance authority, by adding the Senate Judiciary Committee as a recipient of the semi-annual FISA reports that the Attorney General currently must submit to the House and Senate Intelligence committees,<sup>48</sup> and by modifying the FISA report requirements to include a description of the total number of applications made for orders approving roving electronic surveillance.<sup>49</sup>

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and expense for a party that desires to challenge the order in court.”).

<sup>43</sup> See, e.g., EPIC Report (“The ‘generic’ roving wiretap orders raise significant constitutional issues, as they do not comport with the Fourth Amendment’s requirement that any search warrant ‘particularly describe the place to be searched.’ That deficiency becomes even more significant where the private communications of law-abiding American citizens might be intercepted.”).

<sup>44</sup> Proposed 50 U.S.C. 1804(a)(3), proposed 50 U.S.C. 1805(c)(1)(A).

<sup>45</sup> Proposed 50 U.S.C. 1805(c)(2)(B).

<sup>46</sup> The 10 day period may be extended up to 60 days if the court finds good cause to justify the longer period.

<sup>47</sup> Proposed 50 U.S.C. 1805(c)(3).

<sup>48</sup> Proposed 50 U.S.C. 1808(a)(1).

<sup>49</sup> Proposed 50 U.S.C. 1808(a)(2).

## **Section 109. Enhanced Congressional Oversight.**

Section 109(a) enhances congressional oversight over the use of physical searches under FISA, by requiring, on a semi-annual basis, the Attorney General:

- to make full reports concerning all physical searches to the Senate Judiciary Committee in addition to the House and Senate Intelligence committees, and
- to submit to the House Judiciary Committee a report with statistical information concerning the number of emergency physical search orders authorized or denied by the Attorney General.<sup>50</sup>

Section 109(b) requires that the report the Attorney General submits to the House and Senate Judiciary Committees semi-annually concerning the number of applications and orders for the FISA use of pen registers or trap and trace devices,<sup>51</sup> must include statistical information regarding the emergency use<sup>52</sup> of such devices.

Section 109(c) directs the Secretary of Homeland Security to report to the House and Senate Judiciary Committees semi-annually regarding the internal affairs operations and investigations of the U.S. Citizenship and Immigration Services. The first such report is to be submitted no later than April 1, 2006.

Section 109(d) requires the FISA court to publish its rules and procedures and transmit them in unclassified form to all judges on the FISA court, the FISA Court of Review, the Chief Justice of the United States, and the House and Senate Judiciary and Intelligence Committees.

## **Section 110. Attacks Against Railroad Carriers and Mass Transportation Systems.**

Section 110 of the Conference bill merges 18 U.S.C. 1992 (outlawing train wrecking) and 18 U.S.C. 1993 (outlawing attacks on mass transportation system) into a new 18 U.S.C. 1992 intended to provide uniform offense elements and penalties for attacks on all transportation systems on land, on water, or through the air. In addition, current federal law does not explicitly provide criminal punishment for the *planning* of terrorist attacks and other acts of violence against railroads and mass transportation systems, although it does make it a crime to commit them or to attempt, threaten, or conspire to do so.<sup>53</sup> Section 110 addresses this omission by making it a crime to surveil, photograph, videotape, diagram, or otherwise collect

<sup>50</sup> Proposed 50 U.S.C. 1826.

<sup>51</sup> Proposed 50 U.S.C. 1846. These surveillance devices are used to intercept non-content transactional information which reveals the source and destination of wire and electronic communications, such as telephone dialing information, Internet IP addresses, and e-mail routing and addressing. See definitions of these terms, 18 U.S.C. 3127(3), 18 U.S.C. 3127(4).

<sup>52</sup> Proposed 50 U.S.C. 1843.

<sup>53</sup> 18 U.S.C. 1993.

information with the intent to plan or assist in planning, an attack against mass transportation systems.<sup>54</sup> Punishment for the crime is imprisonment for not more than 20 years, but if the offense results in the death of any person, then imprisonment of any years or for life or the death penalty, although the death penalty is not available for inchoate forms of the offense (planning, conveying false information, attempting, threatening, or conspiring).<sup>55</sup> Furthermore, the new 18 U.S.C. 1992 enhances the penalties for committing these criminal acts in circumstances that constitute an aggravated offense, by authorizing imprisonment for any term of years or life, or where death results, the death penalty. Finally incorporating an amendment found in section 304 of the House bill the new 18 U.S.C. 1992 defines covered conveyances and their systems to include passenger vessels.<sup>56</sup>

### **Section 111. Forfeiture.**

Federal law permits U.S. confiscation of property derived from certain drug offenses committed in violation of foreign law,<sup>57</sup> and also permits U.S. confiscation of all assets, foreign or domestic, associated with certain terrorist offenses.<sup>58</sup> Section 111 amends the general civil forfeiture statute to authorize seizure of property within U.S. jurisdiction constituting, derived from, or traceable to, any proceeds obtained in (or any property used to facilitate) an offense that involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, if such offense is punishable under foreign law by death or imprisonment for a term exceeding one year or would be so punishable if committed within U.S. jurisdiction.<sup>59</sup>

### **Section 112. Section 2332b(g)(5)(B) Amendments Relating to the Definition of Federal Crime of Terrorism.**

Crimes designated as federal crimes of terrorism under 18 U.S.C. 2332b(g)(5) trigger the application of other federal laws, for example, 18 U.S.C. 1961(1)(g) (RICO predicates), 18 U.S.C. 3142 (bail), 18 U.S.C. 3286 (statute of limitations), and 18 U.S.C. 3583 (supervised release). Section 112 of the Conference bill adds two additional offenses to the current definition of federal crimes of terrorism: receiving military-type training from a foreign terrorist organization,<sup>60</sup> and drug trafficking in support of terrorism (the “narco-terrorism” provisions of Section 1010A of the Controlled Substances Import and Export Act).<sup>61</sup>

<sup>54</sup> Proposed 18 U.S.C. 1992(a)(8).

<sup>55</sup> Proposed 18 U.S.C. 1992(a).

<sup>56</sup> Proposed 18 U.S.C. 1992(d)(7). Here and hereafter “the House bill” refers to the version of H.R. 3199 which the House sent to conference.

<sup>57</sup> 18 U.S.C. 981(a)(1)(B).

<sup>58</sup> 18 U.S.C. 981(a)(1)(G).

<sup>59</sup> Proposed 18 U.S.C. 981(a)(1)(B)(i).

<sup>60</sup> 18 U.S.C. 2339D.

<sup>61</sup> Proposed 21 U.S.C. 960A created in section 122 of the Conference bill.

### **Section 113. Amendments to Section 2516(1) of Title 18, United States Code.**

Generally, federal law requires the government to obtain a court order authorizing the interception of wire, oral or electronic communications in the investigation of certain crimes (“predicate offenses”) specifically enumerated in 18 U.S.C. 2516(1). Section 113 expands the list of predicate offenses in which law enforcement may seek wiretap orders to include crimes relating to biological weapons, violence at international airports, nuclear and weapons of mass destruction threats, explosive materials, receiving terrorist military training, terrorist attacks against mass transit, arson within U.S. special maritime and territorial jurisdiction, torture, firearm attacks in federal facilities, killing federal employees, killing certain foreign officials, conspiracy to commit violence overseas, harboring terrorists, assault on a flight crew member with a dangerous weapon, certain weapons offenses aboard an aircraft, aggravated identity theft, “smurfing” (a money laundering technique whereby a large monetary transaction is separated into smaller transactions to evade federal reporting requirements on large transactions), and criminal violations of certain provisions of the Sherman Antitrust Act.

### **Section 114. Delayed Notice Search Warrants.**

A delayed notice search warrant, or “sneak and peek” warrant, is one that authorizes law enforcement officers to secretly enter a home or business, either physically or virtually, conduct a search, and depart without taking any tangible evidence or leaving notice of their presence. The Department of Justice has defended the necessity and legality of delayed notification search warrants:

This tool can be used only with a court order, in extremely narrow circumstances when immediate notification may result in death or physical harm to an individual, flight from prosecution, evidence tampering, witness intimidation, or serious jeopardy to an investigation. The reasonable delay gives law enforcement time to identify the criminal’s associates, eliminate immediate threats to our communities, and coordinate the arrests of multiple individuals without tipping them off beforehand. In all cases, law enforcement must give notice that property has been searched or seized.<sup>62</sup>

Until the Patriot Act was enacted, the Federal Rules of Criminal Procedure required contemporaneous notice in most instances.<sup>63</sup> At the time, the courts were divided over whether the failure to provide contemporaneous notice, in the absence of exigent circumstances, constituted a constitutional violation or a violation of the Rule, and over the extent of permissible delay in cases presenting exigent circumstances.<sup>64</sup> Section 213 of the PATRIOT Act created an express statutory authority for delayed notice search warrants in any criminal investigation, not just

<sup>62</sup> U.S. Dep’t of Justice, *Dispelling Some of the Major Myths about the USA PATRIOT Act*, available on Jan. 13, 2006 at [[http://www.lifeandliberty.gov/subs/u\\_myths.htm](http://www.lifeandliberty.gov/subs/u_myths.htm)].

<sup>63</sup> FED. R. CRIM. P. 41(d), 18 U.S.C. App. (2000 ed.).

<sup>64</sup> See *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Simmons*, 206 F.3d 292 (4th Cir. 2000).

those involving suspected terrorist activity.<sup>65</sup> Delayed notification of the execution of a sneak and peek search warrant is permissible for a reasonable period of time (with the possibility of court-approved extensions for good cause shown), if:

- the court that issued the warrant finds reasonable cause to believe that contemporaneous notice of the search may result in adverse consequences (flight, destruction of evidence, intimidation of a witness, danger to an individual, serious jeopardy to an investigation, or undue trial delay), and
- the warrant prohibits the seizure of any tangible property, any wire or electronic communication, and any stored wire or electronic information, except where the court finds reasonable necessity for the seizure.

Responding to concerns that the “reasonable period” for delaying notification of a search warrant is an undefined and indefinite standard under current law, section 114 of the Conference bill establishes a specific limitation on the length of the delay, requiring notice to be given no more than 30 days after the date of the warrant’s execution, with the possibility for 90 day extensions if the facts of a case justify.<sup>66</sup> In addition, it removes “unduly delaying a trial” as one of the “adverse consequences” that justifies delayed notification. Some commentators have noted that “seriously jeopardizing an investigation,” which is retained by the Conference bill as a ground for permitting delayed notice, is an overly broad “catch-all” provision that law enforcement officials could abuse.<sup>67</sup> There may also be some question of whether it qualifies as a constitutionally acceptable exigent circumstance. However, Justice Department officials defend this provision, observing that before the delayed notice can be approved, a federal judge must agree with the government’s evaluation of the circumstances that indicate that contemporaneous notice of a search might seriously jeopardize an ongoing investigation.<sup>68</sup>

<sup>65</sup> 18 U.S.C. 3103a. Critics have expressed concerns about the constitutionality of delayed notice search warrants as well as potential abuse of the power. *See, e.g., EPIC Report* (“The expansion of this extraordinary authority to all searches constitutes a radical departure from Fourth Amendment standards and could result in routine surreptitious entries by law enforcement agents.”); American Civil Liberties Union (ACLU), *Surveillance Under the USA PATRIOT Act* (April 3, 2003), available on Jan. 13, 2006 at [<http://www.aclu.org/safe&free/general/17326res20030403.html>] (“Notice is a crucial check on the government’s power because it forces the authorities to operate in the open, and allows the subjects of searches to protect their Fourth Amendment rights. For example, it allows them to point out irregularities in a warrant ... Search warrants often contain limits on what may be searched, but when the searching officers have complete and unsupervised discretion over a search, a property owner cannot defend his or her rights.”).

<sup>66</sup> Proposed 18 U.S.C. 3103a(b)(3).

<sup>67</sup> *See ACLU, ACLU Letter to Congress Urging A “No” Vote On the USA PATRIOT Improvement and Reauthorization Act Conference Report* (Dec. 12, 2005), available on Jan. 13, 2006 at [<http://www.aclu.org/safe&free/general/22394leg20051207.html>].

<sup>68</sup> *Oversight Hearing on the “Implementation of the USA PATRIOT Act: Sections 201, 202, 223 of the Act that Address Criminal Wiretaps, and Section 213 of the Act that Addresses Delayed Notice”: Hearings Before the Subcomm. on Crime, Terrorism, and Homeland*

Finally, section 114 enhances oversight of delayed notice search warrants, by requiring that no later than 30 days after the expiration or denial of such a warrant, the issuing or denying judge must notify the Administrative Office of the U.S. Courts of:

- the fact that the delayed notice search warrant was applied for,
- the fact that the warrant was either granted, modified, or denied,
- the length of time of the delay in giving notice, and
- the offense specified in the warrant or the application.<sup>69</sup>

The Director of the Administrative Office is required to transmit a detailed, annual report to Congress that summarizes the use and number of warrants authorizing delayed notice.

### **Section 115. Judicial Review of National Security Letters.**

Five federal statutes, in roughly the same terms, authorize federal intelligence investigators (generally the FBI) to request that communications providers, financial institutions and credit bureaus provide certain customer information relating to a national security investigation.<sup>70</sup> A federal court in the Southern District of New York has held that the FBI's practices and procedure surrounding the exercise of its authority under one of these national security letter (NSL) statutes, 18 U.S.C. 2709, violate the Fourth and First Amendments.<sup>71</sup> In the opinion of the court, the constitutional problem stems from the effective absence of judicial review before or after the issuance of an NSL under section 2709 and from the facially absolute, permanent confidentiality restrictions ("gag order") that the statute places on NSL recipients.<sup>72</sup>

Section 115 of the Conference bill attempts to address these potential constitutional deficiencies by authorizing judicial review of a NSL.<sup>73</sup> The recipient of a NSL request may petition a U.S. district court for an order modifying or setting

*Security of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of Chuck Rosenberg, Chief of Staff to Deputy Attorney General, U.S. Dep't of Justice), at 3-4, available Jan. 13, 2006 at [<http://judiciary.house.gov/media/pdfs/rosenberg050305.pdf>] (stating that "[t]here are a variety of ways in which investigators and prosecutors should not be precluded from obtaining a delayed notice search warrant simply because their request does not fall into one of the other four circumstances listed in the statute").

<sup>69</sup> Proposed 18 U.S.C. 3103a(d)(1).

<sup>70</sup> 12 U.S.C. 3414; 15 U.S.C. 1681u, 1681v; 18 U.S.C. 2709; 50 U.S.C. 436. For more information concerning national security letters, see CRS Report RL32880, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*, by Charles Doyle.

<sup>71</sup> *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004); see also, *Doe v. Gonzalez*, 386 F.Supp.2d 66 (D.Conn. 2005)(reaching a similar conclusion on First Amendment grounds).

<sup>72</sup> *Ashcroft*, 334 F.Supp.2d at 526-27.

<sup>73</sup> Proposed 18 U.S.C. 3511.

aside the request. The federal court may modify or quash the NSL request if compliance would be unreasonable, oppressive, or otherwise unlawful.

In addition to providing the right to challenge the validity of the NSL request, section 115 expressly grants NSL recipients the power to petition a federal district court to modify or quash the nondisclosure requirement imposed in connection with the request.<sup>74</sup> By contrast, a recipient of a section 215 FISA order for tangible items is not provided an explicit statutory right to challenge in court the gag order that attaches to a 215 order. However, section 115 creates a bifurcated procedure for handling petitions for judicial review of the nondisclosure requirement:<sup>75</sup>

1) If the petition is filed within one year of the NSL request, the U.S. district court may modify or set aside the gag order if it finds no reason to believe that disclosure may:

- endanger the national security of the United States,
- interfere with a criminal, counterterrorism, or counterintelligence investigation,
- interfere with diplomatic relations, or
- endanger the life or physical safety of any person.

If, at the time of the petition, a high-ranking government official<sup>76</sup> certifies that disclosure may:

- endanger the national security of the United States, or
- interfere with diplomatic relations,

then the court must treat the government certification as **conclusive** unless the court finds that the certification was made in bad faith.

2) If the petition challenging the gag order is filed one year or more after the NSL issuance, a high-ranking government official must, within 90 days of the petition, either terminate the gag order or re-certify that disclosure may:

- endanger the national security of the United States,
- interfere with a criminal, counterterrorism, or counterintelligence investigation,
- interfere with diplomatic relations, or
- endanger the life or physical safety of any person.

If such recertification occurs, then a court may modify or quash the gag order if it finds no reason to believe that disclosure may:

<sup>74</sup> Proposed 18 U.S.C. 3511(b)(1).

<sup>75</sup> Proposed 18 U.S.C. 3511(b)(2)-(3).

<sup>76</sup> If the NSL is issued by the Department of Justice, this person must be the Attorney General, Deputy AG, or the Director of the FBI; if the NSL information is requested by any agency, department, or instrumentality other than the Justice Department, then the individual must be its head or deputy. Proposed 18 U.S.C. 3511(b)(2).

- endanger the national security of the United States,
- interfere with a criminal, counterterrorism, or counterintelligence investigation,
- interfere with diplomatic relations, or
- endanger the life or physical safety of any person.

However, if the recertification was made by the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI, and if such recertification stated that disclosure may:

- endanger the national security of the United States, or
- interfere with diplomatic relations

then such certification is to be treated by the court as **conclusive** unless it was made in bad faith.

If court denies the petition for an order to modify the nondisclosure requirement, the NSL recipient is **precluded** from filing another such petition for one year.

Although the Conference bill provides a process to challenge the nondisclosure requirement, critics believe that this right is “illusory”: “A recipient would technically be given a right to challenge the gag order but if the government asserted national security, diplomatic relations or an ongoing criminal investigation the court would be required to treat that assertion as conclusive, making the ‘right’ an illusion.”<sup>77</sup>

**Judicial Enforcement of a NSL.** In addition to authorizing judicial review of NSLs, section 115 also provides the government with the means to enforce the NSL through court action. If a NSL recipient fails to respond to the request for information, the Attorney General may seek a federal district court order to compel compliance with the request.<sup>78</sup> Disobedience of the U.S. district court’s order to respond to a NSL is punishable as contempt of court.

**Closed Proceedings.** Section 115 also directs that any court proceedings concerning NSL matters must be closed, subject to any right to an open hearing in a contempt proceeding, to prevent unauthorized disclosure of the NSL request.<sup>79</sup> In addition, all petitions, filings, records, orders, and subpoenas must be kept under seal

<sup>77</sup> ACLU, *ACLU Letter to Congress Urging A “No” Vote On the USA PATRIOT Improvement and Reauthorization Act Conference Report* (Dec. 12, 2005), available Jan. 13, 2006 at [<http://www.aclu.org/safe/legislative/22394leg20051207.html>].

<sup>78</sup> Proposed 18 U.S.C. 3511(c). Critics of this new provision claim that it effectively transforms NSLs into national security subpoenas. See ACLU, *ACLU Letter to Congress Urging A “No” Vote On the USA PATRIOT Improvement and Reauthorization Act Conference Report* (Dec. 12, 2005), available on Jan. 13, 2006 at [<http://www.aclu.org/safe/legislative/22394leg20051207.html>].

<sup>79</sup> Proposed 18 U.S.C. 3511(d).

to prevent unauthorized disclosure. Finally, the government may request that its evidence be considered ex parte and in camera.<sup>80</sup>

### **Section 116. Confidentiality of National Security Letters.**

Section 116 of the Conference bill amends all five NSL statutes to prohibit communications service providers from disclosing to any person that the FBI has sought or obtained access to the information sought through the NSL, if the investigative agency has certified that disclosure may endanger any individual or the national security of the United States, interfere with diplomatic relations, or interfere with a criminal or intelligence investigation. However, disclosure is permitted to any person whose assistance is needed to comply with the NSL request or to an attorney to obtain legal advice or legal assistance concerning the NSL.<sup>81</sup> Although a person making or intending to make a disclosure may be required to notify the FBI of those to whom they intend to disclose, the person is not required to inform the FBI of an intent to consult with an attorney to obtain legal assistance.<sup>82</sup>

### **Section 117. Violations of Nondisclosure Provisions of National Security Letters.**

This section punishes a person who was notified of a NSL nondisclosure requirement but nevertheless knowingly and willfully violates that directive, with imprisonment of not more than one year, or not more than five years if committed with the intent to obstruct an investigation or judicial proceeding.<sup>83</sup> Current law does not provide a felony charge for such disclosure to an unauthorized person.

### **Section 118. Reports on National Security Letters.**

Section 118 of the Conference bill requires that any reports to a Congressional committee regarding NSLs shall also be provided to the House and Senate Judiciary Committees. In addition, the Attorney General must submit a report semiannually on all NSL requests made under the Fair Credit Reporting Act, to the House and Senate Judiciary Committees, the House and Senate Intelligence Committees, and the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.<sup>84</sup>

<sup>80</sup> Proposed 18 U.S.C. 3511(e).

<sup>81</sup> Proposed 18 U.S.C. 2709(c)(1); proposed 15 U.S.C. 1681u(d)(1); proposed 15 U.S.C. 1681v(c)(1); proposed 12 U.S.C. 3414(a)(3)(A); proposed 12 U.S.C. 3414(a)(5)(D)(i); proposed 50 U.S.C. 436(b)(1).

<sup>82</sup> Proposed 18 U.S.C. 2709(c)(4); proposed 15 U.S.C. 1681u(d)(4); proposed 15 U.S.C. 1681v(c)(4); proposed 12 U.S.C. 3414(a)(3)(D); proposed 12 U.S.C. 3414(a)(5)(D)(iv); proposed 50 U.S.C. 436(b)(4).

<sup>83</sup> Proposed 18 U.S.C. 1510(e).

<sup>84</sup> Proposed 15 U.S.C. 1681v(f).

The Attorney General is also instructed to submit to Congress an annual report describing the total number of requests made by the Department of Justice under the NSL statutes. This report is to be unclassified, in order to permit public scrutiny.

### **Section 119. Audit of Use of National Security Letters.**

The Inspector General of the Department of Justice is to perform a comprehensive audit of the effectiveness and use of NSLs, including any improper or illegal use, for submission to the House and Senate Judiciary and Intelligence Committees for calendar years 2003-2006. This report is to be unclassified.

Section 119 also requires the Attorney General and Director of National Intelligence to analyze the feasibility of applying minimization procedures to NSL to ensure the protection of the constitutional rights of U.S. persons. This feasibility study is to be submitted to the House and Senate Judiciary and Intelligence Committees by February 1, 2007, or upon completion of the audit of the use of NSLs for calendar years 2003 and 2004, whichever is earlier.

### **Section 120. Forfeiture for Acts of Terrorism.**

18 U.S.C. 981(a)(1)(G) calls for the confiscation of property of those planning or engaged in acts of domestic or international terrorism (as defined in 18 U.S.C. 2331) against the United States or its citizens. Domestic terrorism is defined in 18 U.S.C. 2331 (section 802 of the USA PATRIOT Act ), and includes acts dangerous to human life in violation of state or federal law committed to influence the policy of a government or civilian population by intimidation or coercion, 18 U.S.C. 2331(5). Critics might suggest that the juxtaposition of the definition and the confiscation provisions of section 981(a)(1)(G) could result in the confiscation of the property of political action organizations whose members became involved in a picket sign swinging melee with counter demonstrators.<sup>85</sup> In contrast, 18 U.S.C. 2332b(g)(5)(B) seems less susceptible to such challenges since it defines terrorism by reference to violations of specific federal terrorist offenses rather than the generic, violation of state or federal law found in section 2331.

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<sup>85</sup> 151 CONG. REC. H6262 (daily ed. July 21, 2005)(statement of Rep. Delahunt) (“This is about domestic terrorism and the definition of domestic terrorism. And while it does not create a new crime under the PATRIOT Act, the definition triggers an array of expanded governmental authorities, including enhanced civil asset seizure powers. It is so broadly defined that it could include acts of civil disobedience because they may involve acts that endanger human life...”); 151 CONG. REC. H6262-263 (daily ed. July 21, 2005) (statement of Rep. Sensenbrenner)(“There are various definitions of terrorism under Federal law. In title XVIII there has been a confusion over a new definition created in the USA PATRIOT Act for domestic terrorism. That provision is supposed to be used for administrative procedures such as nationwide searches, but another part of the PATRIOT Act, section 806, uses the reference for asset forfeiture, which is more of a penalty. This has raised concerns about those who exercise their first amendment rights. As a result, groups from both sides of the political spectrum have wanted to change the definition for domestic terrorism. This amendment fixes the problem...”).

Section 120 replaces terrorism defined in 18 U.S.C. 2331 with terrorism defined in 18 U.S.C. 2332b(g)(5)(B) as the ground for confiscation under section 981(a)(1)(G). It does so by amending 18 U.S.C. 981(a)(1)(G) so that it calls for the confiscation of property of those planning or engaged acts of domestic or international terrorism (as defined in 18 U.S.C. 2332b(g)(5)(B)) against the United States or its citizens.

### **Section 121. Cigarette Smuggling.**

Federal law proscribes trafficking in contraband cigarettes (i.e., trafficking in more than 60,000 cigarettes without the required tax stamps).<sup>86</sup> Violations are punishable by imprisonment for up to five years,<sup>87</sup> and constitute racketeering predicate offenses.<sup>88</sup>

During debate on the House floor several members pointed to the fact that in at least one instance terrorists had resorted to cigarette smuggling as a financing mechanism.<sup>89</sup>

Section 121, modeled closely after section 123 of the House bill, recasts the federal statute lowering the threshold definition to 10,000 cigarettes and to 500 cans or packages of smokeless tobacco; and creates a federal cause action against violators (other than Indian tribes or Indians in Indian country) for manufacturers, exporters, and state and local authorities.<sup>90</sup>

### **Section 122. Narco-Terrorism.**

Federal law prohibits drug trafficking with severe penalties calibrated according to the kind and volume of drugs and the circumstances involved<sup>91</sup> (e.g., trafficking in 50 grams or more of crack cocaine is punishable by imprisonment for not less than 10 years and for not more than life; distributing a small amount of marijuana for no remuneration is punishable by imprisonment for not more than one year)<sup>92</sup>. Drug offenses that involved additional egregious circumstances are often subject to

<sup>86</sup> 18 U.S.C. 2341-2346

<sup>87</sup> 18 U.S.C. 2344.

<sup>88</sup> 18 U.S.C. 1961(1). Federal racketeer influenced and corrupt organization laws (RICO) proscribe the acquisition or operation of an enterprise, whose activities affected interstate or foreign commerce, through the patterned commission of other specifically designated crimes (predicate offenses); offenders face imprisonment for up to 20 years and confiscation of offense related property, 18 U.S.C. 1961-1963.

<sup>89</sup> 151 CONG. REC. H6284 (daily ed. July 21, 2005) (statements of Reps. Coble, Sensenbrenner, Cantor, and Kildee).

<sup>90</sup> Proposed 18 U.S.C. 2341-2346

<sup>91</sup> 21 U.S.C. 841-971.

<sup>92</sup> 21 U.S.C. 841, 844.

multiples of the sanctions for the underlying offense.<sup>93</sup> Providing material support for the commission of a terrorist crime or to a designated foreign terrorist organization is likewise a federal crime, punishable by imprisonment for not more than 15 years.<sup>94</sup>

The Conference bill in section 122 adopts the language of section 124 of the House bill. There were no comparable provisions in S. 1389. It outlaws drug trafficking — for the benefit of a foreign terrorist organization as defined in the immigration laws, 8 U.S.C. 1182(a)(3)(B), or of a person who has or is engaged in terrorism as defined in 22 U.S.C. 2656f(d)(2) (politically motivated violence against civilian targets) — under a wide range of jurisdictional circumstances.<sup>95</sup> The offense can only be committed with the knowledge of the terrorist misconduct of its beneficiaries.<sup>96</sup> Violators face imprisonment for not less than twice the minimum penalty for drug trafficking under 21 U.S.C. 841(b)(1) nor more than life, and period of supervised release of not less than five years.<sup>97</sup> The Conference bill, unlike its House predecessor, expressly prohibits attempts and conspiracies to violate the new section. The difference is more a matter emphasis than substance since 21 U.S.C. 963 would have produced the same result in the absence of an express provision.

<sup>93</sup> See, e.g., 21 U.S.C. 859 (sale of drugs to a child: twice the normal penalty); 861 (use a child in drug trafficking: twice the normal penalty); 861(f) (sale of drugs to a pregnant woman: twice the normal penalty).

<sup>94</sup> 18 U.S.C. 2339A, 2339B.

<sup>95</sup> Proposed 21 U.S.C. 960A(b) (“There is jurisdiction over an offense under this section if — (1) the prohibited drug activity or the terrorist offense is in violation of the criminal laws of the United States; (2) the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate or foreign commerce; (3) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause death or serious bodily injury to a national of the United States while that national is outside the United States, or substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions) while that property outside of the United States; (4) the offense or the prohibited drug activity occurs in whole or in part outside of the United States including on the high seas), and a perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or (5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.”) In cases where neither the support, the drug offense, nor the terrorism have any connection to the U.S. other than the later presences of the offender here, paragraph 960A(b)(5) may exceed Congress’ legislative reach unless the benefit of a treaty obligation can be claimed. The House bill defined terrorism in part by reference to our terrorism treaty obligations listed in 18 U.S.C. 2339C(e)(7) and thus might invoke Congress’ authority to enact legislation to define and punish offenses against the law of nations, U.S. CONST. art. I, §8, cl.10, a feature and benefit the Conference bill does not enjoy.

<sup>96</sup> Proposed 21 U.S.C. 960A(c).

<sup>97</sup> Proposed 21 U.S.C. 960A.

### **Section 123. Interfering With the Operation of An Aircraft.**

It is a federal crime to destroy an aircraft or its facilities under various circumstances giving rise to federal jurisdiction or to attempt, or conspire to do so, 18 U.S.C. 32. Violations are punishable by imprisonment for not more than 20 years, id. It is likewise a federal crime to interfere with a member of a flight crew in the performance of their duties; this too is punishable by imprisonment for not more than 20 years (or imprisonment for any term of years or for life in the case of assault with a dangerous weapon), 49 U.S.C. 46504.

Section 123, in the language of section 125 of the House bill before it, amends 18 U.S.C. 32 to make it a federal crime to interfere or disable the operator of an aircraft or aircraft facility with reckless disregard for human safety or with the intent to endanger, subject to the same sanctions that apply to other violations of the section. By operation of section 32 the new prohibition extends to attempts and conspiracies to engage in such conduct, 18 U.S.C. 32(a)(7)(redesignated 18 U.S.C. 32(a)(8)).

### **Section 124. Investigation of Political Activities.**

FISA bars the use of various information collection techniques in the course of a foreign intelligence investigation, if the investigation is based solely on the exercise of First Amendment protected rights, 50 U.S.C. 1805(a)(3)(A), 1824(a)(1)(A), 1942(a)(1).

Section 124, like section 126 in the House bill, expresses the sense of Congress that the federal government should not conduct criminal investigations of Americans based solely on their membership in non-violent political organizations or their participation in other lawful political activity.

### **Section 125. Immunity for Fire Equipment Donors.**

Section 125, like section 131 in the House bill, grants immunity from civil liability to the donors (other than manufacturers) of fire equipment to volunteer fire organizations and resembles legislation introduced earlier in each house, H.R. 1088/S. 766.

### **Section 126. Federal Data Mining Report.**

When 126 came out of the House as section 132 it directed the Attorney General to prepare a report to Congress on *all* data mining activities of *all* federal agencies and departments including the legal authority for such activities and their privacy and civil liberties implications. When section 126 came out of conference it was limited to a report on the “pattern-based” data mining activities of the Department of Justice. The Conference bill does not define “pattern-based” nor does the conference report discuss the limitations on the House bill which the conferees felt appropriate.<sup>98</sup> The

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<sup>98</sup> The want of definition may be significant because the terms are not hermetically sealed legal concepts, *see, e.g., Safeguarding Privacy in the Fight Against Terrorism, Report of*

Senate bill had no similar provision.

### **Section 127. Victims Access Forfeiture Funds.**

Section 981 of title 18 of the United States Code describes various forms of property that are subject to confiscation by the United States because of their proximity to various federal crimes. The proceeds from the confiscation of crime-related property are generally available for law enforcement purposes to the law enforcement agencies that participate in the investigation and prosecution that results in the forfeiture, e.g., 18 U.S.C. 981(e). The funds realized from the collection of criminal fines are generally available for victim compensation and victim assistance purposes, 42 U.S.C. 10601. Victims of violent federal crimes are entitled to restitution, 18 U.S.C. 3663A, and victims of other federal crimes are eligible for restitution, 18 U.S.C. 3663.

Section 127 of the Conference bill, like section 133 of the House bill before it, expresses the sense of Congress that under section 981 victims of terrorists should have access to the assets forfeited. The Senate bill had no comparable provision.

### **Section 128. Information Related to FISA Pen Register.**

Law enforcement officials may secure an order authorizing the installation and use of a pen register or trap and trace device to obtain information relevant to a criminal investigation, 18 U.S.C. 3122, 3123. They are also entitled to a court order directing a communications provider to supply certain customer information when relevant to a criminal investigation, 18 U.S.C. 2703.<sup>99</sup> Foreign intelligence officials

*the Technology and Privacy Advisory Committee*, 45 (March 2004) (“data mining includes ‘pattern-based’ searches . . . These [might] involve developing models of what terrorist behavior might look like and then examining databases for similar patterns. This is similar to commercial data mining techniques — businesses develop a pattern of attributes or behaviors that their good customers have in common, and then search databases to find people meeting those patterns — but potentially far more powerful given the range of data to which the government has access and the capacity of data mining to eliminate the need to aggregate data before searching them. As we use the term, data mining may also include ‘subject-based’ searches, which look for information about a specific individual or links to known terrorist suspects. This has long been a basic tool of criminal investigators everywhere: start with known suspects and, with proper authorization (in many cases, a warrant or a subpoena), look for information about them and the people with whom they interact. However, the power of data mining technology and the range of data to which the government has access have contributed to blurring the line between subject- and pattern-based searches. The broader the search criteria, and the more people other than actual terrorist who will be identified by those criteria, the more pattern-like these searches become. Even when a subject-based search starts with a known suspect, it can be transformed into a pattern-based search as investigators target individuals for investigation solely because of their connection with the suspect. The more tenuous the connection, the more like a pattern-based search it becomes. Searches that lack specific focus on identified suspects do pose greater risk for U.S. persons and should be subject to greater scrutiny and accountability”).

<sup>99</sup> The information available under section 2703 includes “the — (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and

are entitled to secure a FISA order for installation and use of a pen register or trap and trace device in connection with certain foreign intelligence investigations, 50 U.S.C. 1841-1846. Under its national security letter authority the FBI may request communications providers to supply customer name, address, length of service and local and long distance toll billing records, 18 U.S.C. 2709. Under section 215 of the USA PATRIOT Act, the FBI may obtain a FISA tangible item order for customer records held by a communications provider, 50 U.S.C. 1861.

Section 128 of the Conference bill carries forward a provision found in section 6 of the Senate bill under which the FISA court may, in its pen register/trap and trace order, direct a service provider to supply customer information relating to use of the device, proposed 50 U.S.C. 1842(d)(2)(C).<sup>100</sup> The information to be made available is more extensive than what is available under 18 U.S.C. 2709, or to law enforcement officials, but not as extensive as the scope of information under a FISA section 215 “tangible item” order, i.e.:

- (i) in the case of the customer or subscriber using the service covered by the order (for the period specified by the order) —
  - (I) the name of the customer or subscriber;
  - (II) the address of the customer or subscriber;
  - (III) the telephone or instrument number, or other subscriber number or identifier, of the customer or subscriber, including any temporarily assigned network address or associated routing or transmission information;
  - (IV) the length of the provision of service by such provider to the customer or subscriber and the types of services utilized by the customer or subscriber;
  - (V) in the case of a provider of local or long distance telephone service, any local or long distance telephone records of the customer or subscriber;
  - (VI) if applicable, any records reflecting period of usage (or sessions) by the customer or subscriber; and
  - (VII) any mechanisms and sources of payment for such service, including the number of any credit card or bank account utilized for payment for such service; and
  - (i) if available, with respect to any customer or subscriber of incoming or outgoing communications to or from the service covered by the order —
    - (I) the name of such customer or subscriber;
    - (II) the address of such customer or subscriber;
    - (III) the telephone or instrument number, or other subscriber number or identifier, of the customer or subscriber, including any temporarily assigned network address or associated routing or transmission information;
    - (IV) the length of the provision of service by such provider to the customer or subscriber and the types of services utilized by the customer or subscriber, proposed 50 U.S.C. 1842(d)(2)(C).

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durations; (D) length of service (including start date) and types of service utilized; (E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service,” 18 U.S.C. 2703(c)(2).

<sup>100</sup> The House bill had no comparable provision.

The Senate Select Committee on Intelligence observed with respect to an identically worded section in S. 1266, “the FISA audit staff was informed that when a federal court issues an order for criminal pen register or trap and trace device, the court has the authority under 18 U.S.C. 2703(d) to routinely require the service provider to supply subscriber information in its possession for the numbers or e-mail addresses captured by the devices. The FISA pen register/trap and trace provision has no comparable authority. Section 215 of this bill addresses this discrepancy,” S.Rept. 109-85, at 8 (2005).

The amendment would likely simplify the process, but critics might ask why it is necessary since information already seems to be available through use of the national security letter authority under 18 U.S.C. 2709 or the FISA business records “tangible item” authority when used in conjunction with the FISA pen register/trap and trace authority.

Like the Senate bill, the conferees amended the FISA oversight reporting requirements so that Judiciary Committees receive full reports on the use of the FISA’s pen register and trap and trace authority every six months, proposed 50 U.S.C. 1846(a).

### **Title I House Proposals Dropped in Conference.**

Title I of the Conference bill is a melding of modified proposals from the House bill and S. 1389. Due to the relative expanse of its coverage and unlike its Senate counterpart there are entire sections of the House bill which here and in other titles disappeared in conference. In the case of Title I of the Conference bill these fall into one of two categories. Individual sections in the House bill which the conferees combined and sections like first responder funding and notification provisions which they put aside.

**Court Notification of Information Sharing.** Section 105 of the House bill amended a criminal wiretap section, 18 U.S.C. 2517(6) to require that the court which authorized a wiretap be advised when the resulting information was shared with other agencies.<sup>101</sup> Other provisions have rendered the underlying section largely redundant.

**First Responder Funding.** Section 1014 of the USA PATRIOT Act establishes a grant program for state and local domestic preparedness support, 42 U.S.C. 3714. The 108<sup>th</sup> Congress ended before proponents for adjustment in the grant effort were able to reach consensus,<sup>102</sup> although the sense of Congress statement in section 7401 of the Intelligence Reform and Terrorism Prevention Act bespeaks a resolution to do so during the 109<sup>th</sup> Congress.<sup>103</sup> Sections 127 through 131 of the

<sup>101</sup> S. 1389 had no similar provision.

<sup>102</sup> See CRS Report RL32634, *First Responder Grant Formulas: A Comparison of Formula Provisions in S. 2845 and H.R. 10, 108th Congress*, by Shawn Reese.

<sup>103</sup> “It is the sense of Congress that Congress must pass legislation in the first session of the 109th Congress to reform the system for distributing grants to enhance State and local government prevention of, preparedness for, and response to acts of terrorism,” 118 Stat.

House bill passed the House separately as H.R. 1544, 151 *Cong. Rec.* H3236-237 (daily ed. May 12, 2005).<sup>104</sup> They are not included in the Conference bill.<sup>105</sup>

**Mergers.** Section 110 of the Conference bill encompasses the proposals found in sections 110 and 115 of the House bill relating to attacks on mass transit. Section 113 of the Conference bill absorbs the proposals to enlarge the wiretap predicate offense list found in sections 113 and 122 of the House bill. Finally, in section 114 the Conference bill addresses the sneak and peek proposals which the House advanced in its sections 114 and 121.

## Title II: Terrorist Death Penalty Enhancement

Title II in the House bill proposed a substantial number of adjustments in federal death penalty law. The Senate bill had none. The conferees accepted only three of the House proposals, one that involves air piracy cases arising before 1996, a second that eliminates a redundant procedural mechanism in federal capital drug cases, and a third addressed to supervised release for terrorism offenses. The conferees, however, added a new section to Title II and another to Title V. The new section in Title II accomplished a technical transfer of the law governing the appointment of counsel in capital cases. The section in Title V concerns replacing the courts with the Attorney General as a gatekeeper for state access to expedited habeas procedures in capital cases.

### Section 201. Short Title.

Section 201 styles Title II, the “Terrorist Death Penalty Enhancement Act of 2005.”

### Section 211. Pre-1994 Capital Air Piracy Cases.

In the late 1960’s and early 1970’s the Supreme Court held imposition of capital punishment under the procedures then employed by the federal government and most of the states unconstitutional.<sup>106</sup> In 1974, Congress established a revised procedure for imposition of the death penalty in certain air piracy cases.<sup>107</sup> In 1994, when Congress made the procedural adjustments necessary to revive the death penalty as a sentencing option for other federal capital offenses, it replaced the air piracy procedures with those of the new regime.<sup>108</sup> At least one court, however, held that the new procedures could not be applied retroactively to air piracy cases occurring

3849 (2004).

<sup>104</sup> See also H.Rept. 109-65 (2005).

<sup>105</sup> S. 1389 had no comparable first responder funding provisions.

<sup>106</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>107</sup> P.L. 93-366, 88 Stat. 409 (1974), 49 U.S.C. 1473 (1976 ed.)

<sup>108</sup> P.L. 103-322, 108 Stat. 1796, 1970 (1994), 18 U.S.C. 3591-3598.

after the 1974 fix but before the 1994 legislation, in the absence of an explicit statutory provision.<sup>109</sup>

Section 211 adds an explicit provision to the end of the 1994 legislation.<sup>110</sup> The amendment provides for the application of the existing federal capital punishment procedures, 18 U.S.C. ch.228, in addition to consideration of the mitigating and aggravating factors in place prior to the 1994 revival.<sup>111</sup> Section 211 also provides for severance should any of the 1994 factors be found constitutionally invalid, and includes a definition of “especially heinous, cruel, or depraved” used as an aggravating factor in section 46503, to avoid the vagueness problems that might otherwise attend the use of such an aggravating factor.<sup>112</sup>

The conference report notes that the changes apply to a relative small group of individuals responsible for murders committed during the course of hijackings in the mid 1980’s who would otherwise be eligible for parole within 10 years of sentencing and could not be effectively sentenced to more than 30 years in prison.<sup>113</sup>

<sup>109</sup> *United States v. Safarini*, 257 F.Supp.2d 191, 202-3 (D.D.C. 2003).

<sup>110</sup> Proposed subsection 60003(c), amending P.L. 103-322, 108 Stat.1970 (1994).

<sup>111</sup> P.L. 103-272, 108 Stat. 1242 (1994). Because the 1994 legislation was enacted almost immediately after recodification of title 49, 49 U.S.C. 46503 never appeared in the official United States Code or any of its supplements. The predecessor to 49 U.S.C. 46503 as repealed in the 1994 capital punishment revival statute appears in 49 U.S.C. App. 1473 (1988 ed.).

<sup>112</sup> See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 359-61 (1988).

<sup>113</sup> “This provision is particularly important for several reason. In the absence of a death penalty that could be implemented for pre-FDPA hijacking offenses resulting in death that also occurred before the effective date of the Sentencing Guidelines on November 1, 1987, the maximum penalty available would be life imprisonment. Under the pre-Sentencing Guidelines structure, even prisoners sentenced to life imprisonment were eligible for a parole hearing after serving only ten years. While there is a split in the Circuit Courts of Appeals as to whether a sentencing judge can impose a sentence that could avert the 10-year parole hearing requirement, the current position of the Bureau of Prisons is that a prisoner is eligible for a parole hearing after serving ten years of a life sentence. Even if parole is denied on that first occasion, such prisoners are eligible to have regularly scheduled parole hearings every two years thereafter. Moreover, in addition to parole eligibility after ten years, the old sentencing and parole laws incorporated a presumption that even persons sentenced to life imprisonment would be released after no more than 30 years.

“In the context of the individuals responsible for the hijacking incidents described above, most of the perpetrators were no older than in their twenties when they committed their crimes. The imposition of a pre-Guidelines sentence of life imprisonment for these defendants means that many, if not all of them, could be expect to be released from prison well within their lifetime. Given the gravity of these offenses, coupled with the longstanding Congressional intent to have a death penalty available for the offense of air piracy resulting in death, such a result would be at odds with the clear directive of Congress,” H.Rept. 109-333, at 101 (2005).

## **Section 212. Life Time Supervised Release Regardless of Risks.**

A federal court may impose a sentence of supervised release, to be served upon release from prison, of any term of years or life if the defendant has been convicted of a federal crime of terrorism (18 U.S.C. 2332b(g)(5)(B)) involving the foreseeable risk of physical injury of another, 18 U.S.C. 3583(j).<sup>114</sup>

Section 212 amends section 3583 to eliminate the requirement that the defendant be convicted of a crime involving a foreseeable risk of injury; conviction of any federal crime of terrorism is sufficient, proposed 18 U.S.C. 3583(j).

## **Section 221. Capital Procedures in Drug Cases.**

Federal law provides two sets of death penalty procedures for capital drug cases, the procedures applicable in federal capital cases generally, 18 U.S.C. 3591-3598, and the procedures specifically applicable in federal capital drug cases, 21 U.S.C. 848. The two are virtually identical, *United States v. Matthews*, 246 F.Supp.2d 137,

<sup>114</sup> The federal crimes of terrorism are violations of: 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 81 (arson within special maritime and territorial jurisdiction), 175 or 175b (biological weapons), 175c (variola virus), 229 (chemical weapons), subsection (a), (b), (c), or (d) of section 351 (congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (nuclear materials), 842(m) or (n) (plastic explosives), 844(f)(2) or (3) (arson and bombing of Government property risking or causing death), 844(i) (arson and bombing of property used in interstate commerce), 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B) (ii) through (v) (protection of computers), 1114 (killing or attempted killing of officers and employees of the United States), 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (hostage taking), 1361 (government property or contracts), 1362 (destruction of communication lines, stations, or systems), 1366(a) (destruction of an energy facility), 1751(a), (b), (c), or (d) (Presidential and Presidential staff assassination and kidnaping), 1992 (train wrecking), 1993 (terrorist attacks and other acts of violence against mass transportation systems), 2155 (destruction of national defense materials, premises, or utilities), 2156 (national defense material, premises, or utilities), 2280 (violence against maritime navigation), 2281 (violence against maritime fixed platforms), 2332 (certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332f (bombing of public places and facilities), 2332g (missile systems designed to destroy aircraft), 2332h (radiological dispersal devices), 2339 (harboring terrorists), 2339A (providing material support to terrorists), 2339B (providing material support to terrorist organizations), 2339C (financing of terrorism), 2340A (torture); 42 U.S.C. 2122 (prohibitions governing atomic weapons), 2284 (sabotage of nuclear facilities or fuel); 49 U.S.C. 46502 (aircraft piracy), the second sentence of 46504 (assault on a flight crew with a dangerous weapon), 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), 46506 if homicide or attempted homicide is involved (application of certain criminal laws to acts on aircraft), and 60123 (b) (destruction of interstate gas or hazardous liquid pipeline facility). Section 112 of the Conference bill adds 18 U.S.C. 2339D (foreign military training) and 21 U.S.C. 1010A (narco-terrorism) to the list, proposed 18 U.S.C. 2332b(g)(5)(B).

141 (N.D.N.Y. 2002). Section 221 eliminates the specific drug case procedures so that only the general procedures apply in such cases. From the perspective of the conferees, it “eliminates duplicative death procedures under title 21 of the United States code, and consolidates procedures governing all Federal death penalty prosecutions in existing title 18 of the United States Code, thereby eliminating confusing requirements that trial courts provide two separate sets of jury instructions,” H.Rept. 109-333, at 102 (2005).

### **Section 222. Appointment of Counsel in Capital Cases.**

The federal capital drug provisions now house provisions for the appointment of counsel to assist indigents facing federal capital charges and indigent federal and state death row inmates during federal habeas proceedings, 21 U.S.C. 848(q)(4)-(10). Section 222 transfers the provisions to title 18, proposed 18 U.S.C. 3599.

### **Title II House Proposals Dropped in Conference.**

The conferees declined to carry forward several proposals found in the House bill. Thus, the Conference bill has no provision comparable to:

- *Section 211 of the House bill* which created a new federal offense which outlawed committing a terrorist offense resulting in death and which was punishable by death or imprisonment for any term of years or for life, proposed 18 U.S.C. 2339E. The underlying “terrorist offenses” were the commission, attempt to commit, or conspiracy to commit (1) any federal crime of terrorism committed for terrorist purposes as defined by 18 U.S.C. 2332b(g)(except 18 U.S.C. 1363 relating to the destruction of property in federal enclaves); or (2) any violation of 18 U.S.C. ch. 113B (terrorism), 175 (biological weapons), 175b (biological materials), 229 (chemical weapons) 831 (nuclear material), or 42 U.S.C. 2284 (sabotage of nuclear facilities).
- *Section 212 of the House bill* which authorized federal courts sentencing a defendant for a terrorist offense, as defined in 18 U.S.C. 2339E, to a term of federal benefit ineligibility for any term of years or for life, proposed 18 U.S.C. 2339F.
- *Section 214 of the House bill* would have added the new 18 U.S.C. 2339E (“whoever, in the course of committing a terrorist offense, engages in conduct that results in the death of a person”) to the treason/espionage category, proposed 18 U.S.C. 3591(a)(1), and created an additional aggravating factor applicable to the category’s offenses, i.e., “the defendant committed the offense after substantial planning,” proposed 18 U.S.C. 3592(b)(4).
- *Section 231 of the House bill* which changed the wording of one of the mitigating factors in the federal capital punishment statute from, “Another defendant or defendants, equally culpable in the crime, will not be punished by death,” 18 U.S.C. 3592(a)(4), to “The Government could have, but has not, sought the death penalty against another defendant or defendants, equally culpable in the crime,” proposed 18 U.S.C. 3592 (a)(4). Then, it made three aggravating factor changes: (a) amending the “hired the killer” factor to include situations where the defendant merely created the expectation that the killer would be paid, proposed 18 U.S.C. 3592(c)(7); (b) adding all other federal

crimes of terrorism to the homicide aggravating factor that already mentions homicide committed during the course of over a dozen crimes of terrorism as an aggravating circumstance, proposed 18 U.S.C. 3592(c)(1); and (c) creating a new obstruction of justice aggravating factor for those homicides committed “to obstruct investigation or prosecution of any offense,” proposed 18 U.S.C. 3592(c)(17). Finally, it made changes in capital juries by: (a) permitting the court to impanel a new sentencing jury if the initial panel was unable to reach a unanimous death penalty verdict, proposed 18 U.S.C. 3593(b)(2)(E), 3594; (b) allowing sentencing by juries of less than 12 members without the consent of the accused when the court found good cause, proposed 18 U.S.C. 3593(b); (c) increasing the number of regular government peremptory challenges to 9 and permitting each side 4 additional peremptory alternate juror challenges when either 7, 8 or 9 alternates jurors were impaneled, proposed F.R.Crim.P. 25(b)(2), (c)(4)(C).

## **Title III: Seaport Terrorism**

Title III of the Conference bill mirrors provisions in the House passed bill offered the conferees; it has no counterpart in the Senate bill. But it does reflect the provisions of S. 378, Reducing Crime and Terrorism at America’s Seaports Act of 2005. S. 378, reported by the Senate Judiciary Committee without written report earlier this year, 151 Cong. Rec. 4108 (daily ed. April 21, 2005), dating in part from earlier legislative proposals<sup>115</sup> including the Clinton Administration’s proposed 21<sup>st</sup> Century Law Enforcement and Public Safety Act, introduced as S. 2783 in the 106<sup>th</sup> Congress and endorsed in some its particulars by the pre-9/11, Interagency Commission on Crime and Security in U.S. Seaports.<sup>116</sup>

### **Section 301. Short Title.**

Section 301 designates Title III the “Reducing Crime and Terrorism at America’s Seaports Act of 2005.”

### **Section 302. Seaport Entry by False Pretenses.**

The Maritime Transportation Security Act requires the submission to the Department of Homeland Security of vessel and facility security plans that include provisions for establishing and controlling secure areas, 46 U.S.C. 70103(c). The act also calls for issuance of transportation security cards in order to regulate access to secure areas, 46 U.S.C. 70105. The act contains no specific provisions regarding trespassing upon security areas, but the Coast Guard and Maritime Transportation Act amended its provisions in a manner that suggests the application of state criminal laws as well as criminal sanctions found in the Deepwater Port Act, 33 U.S.C. 1514 (imprisonment for not more than one year); the Ports and Waterways Safety Act, 33

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<sup>115</sup> See, e.g., S. 899, the 21st Century Justice Act of 1999.

<sup>116</sup> *Report of the Interagency Commission on Crime and Security in U.S. Seaports* (Fall 2000), available on Jan. 13, 2006 at [http://www.securitymanagement.com/library/seaport1200.pdf].

U.S.C. 1232 (imprisonment for not more than 10 years); and the act of June 15, 1917, 50 U.S.C. 192 (imprisonment for not more than 10 years).<sup>117</sup>

As a general matter, it is a federal crime to use fraud or false pretenses to enter federal property, a vessel or aircraft of the United States, or the secured area in an airport, 18 U.S.C. 1036. The offense is punishable by imprisonment for not more than five years if committed with the intent to commit a felony and imprisonment for not more than six months in other cases, *id.* The same maximum penalty applies to making a false statement to federal officials or in any matter within the jurisdiction of a federal agency or department, 18 U.S.C. 1001. Possession of phony government identification to defraud the U.S. is a one year felony absent further aggravating circumstances under which the sanctions are increased, 18 U.S.C. 1028 (a)(4), (b)(6). Moreover, except to the extent covered by 18 U.S.C. 1036 or 18 U.S.C. 1863 (trespassing in the national forests), unlawful entry to property (federal or otherwise) with the intent to commit a second crime is punishable under the laws of the state in which it occurs, *cf.*, 18 U.S.C. 13.

Section 302 expands 18 U.S.C. 1036 to cover seaports and increases the penalty, for violations with respect to any of the protected areas committed with the intent to commit a felony, from imprisonment for not more than five years to imprisonment for not more than 10 years, proposed 18 U.S.C. 1036.<sup>118</sup> The section also provides a definition of “seaport,” proposed 18 U.S.C. 26.<sup>119</sup>

<sup>117</sup> 46 U.S.C. 70119 expressly authorizes state and local law enforcement officers to make arrests for violations of these Acts, and notes that the authority is in addition and should not be construed to limit any other authority they may possess.

<sup>118</sup> “(a)Whoever, by any fraud or false pretense, enters or attempts to enter — (1) any real property belonging in whole or in part to, or leased by, the United States; (2) any vessel or aircraft belonging in whole or in part to, or leased by, the United States; (3) *any secured or restricted area of any seaport, designated as secure in an approved security plan, as required under section 70103 of title 46, United States Code, and the rules and regulations promulgated under that section;* or (4) any secure area of any airport, shall be punished as provided in subsection (b) of this section.

“(b) The punishment for an offense under subsection (a) of this section is — (1) a fine under this title or imprisonment for not more than [5 years] 10 years, or both, if the offense is committed with the intent to commit a felony; or (2) a fine under this title or imprisonment for not more than 6 months, or both, in any other case,” proposed 18 U.S.C. 1036(a),(b) (proposed changes *italics - deletion in bold*).

<sup>119</sup> “As used in this title, the term ‘seaport’ means all piers, wharves, docks, and similar structures, adjacent to any waters subject to the jurisdiction of the United States, to which a vessel may be secured, including areas of land, water, or land and water under and in immediate proximity to such structures, buildings on or contiguous to such structures, and the equipment and materials on such structures or in such buildings,” proposed 18 U.S.C. 26.

The term “seaport” does not appear to have been used in any other section of title 18; elsewhere in federal law the term “port” is more commonly used, *see, e.g.*, 6 U.S.C. 468 (Coast Guard’s homeland security mission), 18 U.S.C. 2199(stowaways), perhaps to make clear that ports such as those on Great Lakes are covered notwithstanding the fact they may not ordinarily be thought of as “seaports.”

The conference report quotes the Interagency Commission report and describes the problems the amendments are designed to address:

According to the Report of the Interagency Commission . . . ‘[c]ontrol of access to the seaport or sensitive areas within the seaport is often lacking.’ Such unauthorized access is especially problematic, because inappropriate controls may result in the theft of cargo and more dangerously, undetected admission of terrorists. In addition to establishing appropriate physical, procedural, and personnel security for seaports, it is important that U.S. criminal law adequately reflect the seriousness of the offense. H.Rept. 109-333, at 103 (2005).

But, critics might point out, the section does not deal with all “unauthorized access” only access accomplished by fraud. And even if the seriousness of such unauthorized access to seaport restricted areas with criminal intent might warrant imprisonment for up to 10 years, there is nothing in conference or Commission reports to explain the necessity for the comparable penalty increase for the other forms of trespassing upon the other areas covered under section 1036. Or so critics might argue.

**Section 303. Obstructing Maritime Inspections.** Various federal laws prohibit the failure to heave to or otherwise obstruct specific maritime inspections under various circumstances.<sup>120</sup>

Section 303 replicates section 303 of the House bill and establishes a new, general federal crime that outlaws, in the case of vessel subject to the jurisdiction of the United States, the failure to heave to, or to forcibly interfere with the boarding of the vessel by federal law enforcement or resist arrest, or to provide boarding federal law enforcement officers with false information concerning the vessel’s cargo, origin, destination, registration, ownership, nationality or crew, proposed 18 U.S.C. 2237. The crime is punishable by imprisonment for not more than five years.

**Section 304. Interference with Maritime Commerce.** Existing federal law prohibits violence against maritime navigation, 18 U.S.C. 2280, burning or bombing vessels, 18 U.S.C. 2275, burning or bombing property used in or whose use affects interstate or foreign commerce, 18 U.S.C. 844(i), destruction of property within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 1363. None of them are punishable by life imprisonment unless death results from their commission, *id.*<sup>121</sup>

Section 304, like section 305 of the House bill creates two new federal crimes, One makes it a federal crime punishable by imprisonment for any term of years or for life (or the death penalty if death results) to place a dangerous substance or device in

<sup>120</sup> See, e.g., 16 U.S.C. 2435, 2438 (enforcement of the Antarctic Marine Living Resources Convention); 16 U.S.C. 5505, 5508 (high seas fishing compliance).

<sup>121</sup> For example, section 2280, which among other things, “prohibits destroy[ing] a ship or caus[ing] damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship” or attempting or conspiring to do so is punishable by imprisonment for not more than 20 years or if death results by death or imprisonment for life or any term of years, 18 U.S.C. 2280(a)(1)(C),(H).

the navigable waters of the United States with the intent to damage a vessel or its cargo or to interfere with maritime commerce, proposed 18 U.S.C. 2282A. Critics may wonder why the existing penalty structure was considered insufficient.

The second of section 304's provisions makes it a federal crime punishable by imprisonment for not more than 20 years to tamper with any navigational aid maintained by the Coast Guard or St. Lawrence Seaway Development Corporation in manner likely to endanger navigation, proposed 18 U.S.C. 2282B. Opponents may find the sanctions a bit stiff, but in the words of the conference report, "the Coast Guard maintains over 50,000 navigational aids on more than 25,000 miles of waterways. These aids . . . are inviting targets for terrorists," H.Rept. 109-333, at 103 (2005). There may also be some question why the new section is necessary if 18 U.S.C. 2291(a)(3) as proposed in section 306 of the Conference bill is enacted, since that subsection states, "Whoever knowingly . . . damages, destroys, or disables . . . any aid to navigation . . . shall be . . . imprisoned not more than 20 years;" *see also*, proposed 18 U.S.C. 2291(a)(4) ("Whoever knowingly interferes by force or violence with the operation of . . . any aid to navigation . . . , if such action is likely to endanger the safety of any vessel in navigation").

### **Section 305. Transporting Dangerous Materials or Terrorists.**

Like section 306 of the House bill before it, section 305 of the Conference bill establishes two other federal terrorism-related transportation offenses, one for transporting dangerous materials and the other for transporting terrorists.

**Transporting Dangerous Materials.** It is a federal crime to possess biological agents, chemical weapons, atomic weapons, and nuclear material, each punishable by imprisonment for any term of years or for life.<sup>122</sup> And although the penalties vary, it is likewise a federal crime to commit any federal crime of terrorism.<sup>123</sup> Moreover, it is a federal crime to provide material support, including transportation, for commission of various terrorist crimes or for the benefit of a designated terrorist organization, 18 U.S.C. 2339A, 2339B, or to transport explosives in interstate or foreign commerce with the knowledge they are intended to be used in injure an individual or damage property, 18 U.S.C. 844(d). Most of these offenses condemn attempts and conspiracies to commit them, and accomplices and coconspirators incur comparable liability in any event.<sup>124</sup>

Section 305 establishes a new federal offense which prohibits transporting explosives, biological agents, chemical weapons, radioactive or nuclear material knowing it is intended for use to commit a federal crime of terrorism — aboard a vessel in the United States, in waters subject to U.S. jurisdiction, on the high seas, or aboard a vessel of the United States, proposed 18 U.S.C. 2283. The crime is punishable by imprisonment for any term of years or for life and may be punishable by death if death results from commission of the offense, *id.*

<sup>122</sup> 18 U.S.C. 175, 229, 831; 42 U.S.C. 2272.

<sup>123</sup> Each crime designated in 18 U.S.C. 2332b(g)(5)(B) carries its own penalty.

<sup>124</sup> 18 U.S.C. 2; *United States v. Pinkerton*, 328 U.S. 640, 647-48 (1946).

**Transporting Terrorists.** While it is a crime to harbor a terrorist, 18 U.S.C. 2339, or to provide material support, including transportation, for the commission of a terrorist offense or for the benefit of a foreign designated terrorist organization, 18 U.S.C. 2339A, 2339B, such offenses are only punishable by imprisonment for not more than 15 years. The same perceived defect may appear to some in the penalties for aiding and abetting commission of the various federal crimes of terrorism and in the penalties available for committing many of them.<sup>125</sup>

Section 305 creates a new federal offense, proposed 18 U.S.C. 2284, punishable by imprisonment for any term of years or for life for transporting an individual knowing he intends to commit, or is fleeing from the commission of, a federal crime of terrorism. Unlike the new 18 U.S.C. 2282A(c), created in section 304, neither of the section 305 offenses have an explicit exception for official activities. Of course, even though facially the new section 2284 forbids transportation terrorists for purposes of extradition or prisoner transfer, it would never likely be read or applied to prevent or punish such activity.

### **Section 306. Interference With Maritime Navigation.**

Chapter 111 of title 18 of the United States Code relates to shipping and by and large outlaws violence in various forms committed against vessels within U.S. jurisdiction.<sup>126</sup> Other sections of the Code proscribe the use of fire, explosives or violence with sufficient breath of protect shipping under some circumstances. For example, one section condemns the use fire or explosives against property used in (or used in an activity affecting) interstate or foreign commerce, 18 U.S.C. 844(i). Another prohibits destruction of property within the maritime jurisdiction of the United States, 18 U.S.C. 1363, and a third, arson within the maritime jurisdiction, 18 U.S.C. 81. Hoaxes relating to violations of chapter 111 are punishable by imprisonment for not more than five years (not more than 20 years if serious injury results and if death results, by imprisonment for any term of years or for life or by death), 18 U.S.C. 1038.

Section 306 of the Conference bill follows the lead of section 307 of the House bill by enacting a new chapter 111A supplementing chapter 111 as well as section 1038 and consisting of four sections. Of the four sections, two are substantive, proscribing hoaxes and the destruction of vessels or maritime facilities, proposed 18 U.S.C. 2291, 2292; and two procedural, one providing the jurisdictional base for the

<sup>125</sup> For example, destruction of aircraft or violence at international airports in violation of 18 U.S.C. 32 and 73 respectively are punishable by imprisonment for not more than 20 years, unless a death results; and the same penalties apply to computer fraud and abuse violations considered federal crimes of terrorism, 18 U.S.C. 1030(a)(5), (c)(4). Aiding and abetting carries the same penalties as the underlying offense, 18 U.S.C. 2.

<sup>126</sup> The offenses include 18 U.S.C. 2271 (conspiracy to destroy vessels), 2272 (destruction of vessel by owner); 2273 (destruction of vessel by nonowner); 2274 (destruction or misuse of vessel by person in charge); 2275 (firing or tampering with vessel), 2276 (breaking and entering a vessel); 2277 (explosives or dangerous weapons aboard vessels); 2278 (explosives on vessels carrying steerage passengers); 2279 (boarding vessels before arrival); 2280 (violence against maritime navigation); and 2281 (violence against maritime fixed platforms).

substantive offenses, proposed 18 U.S.C. 2290, and the other barring prosecution of certain misdemeanor or labor violations, proposed 18 U.S.C. 2993.

According to the conference report, “this section harmonizes the somewhat outdated maritime provisions with the existing criminal sanctions for destruction or interference with an aircraft or aircraft facilities in 18 U.S.C. 32, 34, and 35,” H.Rept. 109-333, at 104 (2005). It is not surprising therefore that the new destruction offense mirrors the substantive provisions for the destruction of aircraft and their facilities, 18 U.S.C. 32,<sup>127</sup> although it differs from the aircraft prohibition in several respects. First, it has exceptions for lawful repair and salvage operations and for the lawful transportation of hazardous waste, proposed 18 U.S.C. 2291(b). Second, in the manner of 18 U.S.C. 1993 (attacks on mass transit), it pushes up the penalty violations involving attacks on conveyances carrying certain hazardous materials to life imprisonment, proposed 18 U.S.C. 2291(c). Third, it tightens the “death results” sentencing escalator so that a sentence of death or imprisonment for life or any term of years is only warranted if the offender intended to cause the resulting death, proposed 18 U.S.C. 2291(d).<sup>128</sup>

<sup>127</sup> “Whoever knowingly — (1) sets fire to, damages, destroys, disables, or wrecks any vessel; (2) places or causes to be placed a destructive device or substance, as defined in section 31(a)(3), or explosive, as defined in section 844(j) in, upon, or near, or otherwise makes or causes to be made unworkable or unusable or hazardous to work or use, any vessel, or any part or other materials used or intended to be used in connection with the operation of a vessel; (3) sets fire to, damages, destroys, disables or places a destructive device or substance in, upon, or near, any maritime facility, including any aid to navigation, lock, canal, or vessel traffic service facility or equipment; (4) interferes by force or violence with the operation of any maritime facility, including any aid to navigation, lock, canal, or vessel traffic service facility or equipment, if such action is likely to endanger the safety of any vessel in navigation; (5) sets fire to, damages, destroys, or disables or places a destructive device or substance in, upon, or near, any appliance, structure, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any vessel or any cargo carried or intended to be carried on any vessel; (6) performs an act of violence against or incapacitates any individual on any vessel, if such act of violence or incapacitation is likely to endanger the safety of the vessel or those on board; (7) performs an act of violence against a person that causes or is likely to cause serious bodily injury, as defined in section 1365(h)(3), in, upon, or near, any appliance, structure, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any vessel or any cargo carried or intended to be carried on any vessel; (8) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safety of any vessel in navigation; or (9) attempts or conspires to do anything prohibited under paragraphs (1) through (8) of this subsection, shall be fined under this title or imprisoned not more than 20 years, or both,” proposed 18 U.S.C. 2291(a). Section 2280 carries the same basic 20 year maximum sanction; the House bill set the maximum at 30 years, the sanction that applies to attacks on mass transit, 18 U.S.C. 1993 (proposed 18 U.S.C. 1992). The other sections cited in the report refer to the death penalty (18 U.S.C. 34) and hoax (18 U.S.C. 35) provisions relating to violations of 18 U.S.C. 32.

<sup>128</sup> This last difference is the work of the conferees, it did not appear in the House passed bill.

In addition to these, the substantive prohibitions of proposed section 2291 differ from the otherwise comparable prohibitions of 18 U.S.C. 2280 in two major respects. The proscriptions in section 2280 and those of section 32 generally require that the prohibited damage adversely impact on safe operation;<sup>129</sup> proposed section 2291 is less likely to feature a comparable demand.

On the other hand, because it is treaty-based, section 2280 enjoys a broader jurisdictional base than proposed section 2290 is able to provide for proposed section 2291. By virtue of proposed section 2290, a violation of proposed section 2291 is only a federal crime if it is committed within the United States, or the offender or victim is a U.S. national, or the vessel is a U.S. vessel, or a U.S. national is aboard the vessel involved.<sup>130</sup> In the case of subsection 32(b) or section 2280 there need be no more connection to the United States than that the offender is subsequently found or brought here, 18 U.S.C. 32(b), 2280(b)(1)(c). Like section 2280, however, proposed section 2291 is subject to exceptions for misdemeanor offenses and labor disputes.<sup>131</sup>

Proposed section 2292 creates a hoax offense in the image of 18 U.S.C. 35 which relates to hoaxes in an aircraft context. It sets a basic civil penalty of not more than \$5000 for hoaxes involving violations of the new proposed section 2291 or of chapter 111, the existing shipping chapter.<sup>132</sup> If the misconduct is committed

<sup>129</sup> “A person who unlawfully and intentionally — (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; (B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; (C) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; (D) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; (E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship; (F) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship; (G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or (H) attempts or conspires to do any act prohibited under subparagraphs (A) through (G), shall be fined under this title, imprisoned not more than 20 years, or both; and if the death of any person results from conduct prohibited by this paragraph, shall be punished by death or imprisoned for any term of years or for life,” 18 U.S.C. 2280(a)(1).

<sup>130</sup> The conferees added this last jurisdictional basis; it has no counterpart in the House bill.

<sup>131</sup> “It is a bar to prosecution under this chapter if — (1) if the conduct in question occurred within the United States in relation to a labor dispute, and such conduct is prohibited as a felony under the law of the State in which it was committed; or (2) such conduct is prohibited as a misdemeanor, and not a felony, under the law of the State in which it was committed,” proposed 18 U.S.C. 2293(a). The conferees added this section; the House bill has no such provision.

<sup>132</sup> “Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made , to do any act that would be a crime prohibited by this chapter or by chapter 111 of this title, shall be subject to a civil penalty of not more than \$5,000, which shall be

“knowingly, intentionally, maliciously, or with reckless disregard for the safety of human life” it is punishable by imprisonment for not more than five years.<sup>133</sup> The conferees added a requirement that in both instances jurisdiction over the offense is governed by the jurisdiction of the offense that is the subject to the hoax.<sup>134</sup>

In the case of hoaxes involving violations of chapter 111, the proposed new section affords the government an alternative ground for prosecution to that offered by 18 U.S.C. 1038.

### **Section 307. Theft From Maritime Commerce.**

Section 307 is one area where the text of the Conference bill and the Conference report diverge. The House bill and the Conference report describe a series of amendments that do essentially two things: they expand or at least clarify the application of various criminal provisions particularly in the case of maritime commerce and they increase the maximum penalties for two of the offenses to 15 years. The text of the Conference bill carries forward the first objective but maintains maximum penalties ceiling at 10 years.

**Theft From Interstate Commerce.** Federal law prohibits theft from shipments traveling in interstate or foreign commerce; violations are punishable by imprisonment for not more than 10 years (not more than one year if the value of the property stolen is \$1000 or less), 18 U.S.C. 659.

Section 307 increases the penalty for theft of property valued at \$1000 or less to imprisonment for not more than three years, proposed 18 U.S.C. 659. It also makes it clear that theft from trailers, cargo containers, freight stations, and warehouses are covered, and that the theft of goods awaiting transshipment is also covered, proposed 18 U.S.C. 659.

**Interstate or Foreign Transportation of Stolen Vessels.** Interstate or foreign transportation of a stolen vehicle or aircraft is punishable by imprisonment for not more than 10 years, 18 U.S.C. 2312; receipt of a stolen vehicle or aircraft that has been transported in interstate or foreign commerce carries the same penalty, 18 U.S.C. 2313.

recoverable in a civil action brought in the name of the United States,” proposed 18 U.S.C. 2292(a).

<sup>133</sup> “Whoever knowingly, intentionally, maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act that would be a crime prohibited by this chapter or by chapter 111 of this title, shall be fined under this title or imprisoned not more than 5 years,” proposed 18 U.S.C. 2292(b).

<sup>134</sup> “Jurisdiction over an offense under this section shall be determined in accordance with the provisions applicable to the crime prohibited by this chapter, or by chapter 111 of this title, to which the imparted or conveyed false information relates, as applicable,” proposed 18 U.S.C. 2292(c).

Section 307 expands the coverage of federal law to cover the interstate or foreign transportation of a stolen vessel and receipt of a stolen vessel that has been transported in interstate or overseas, proposed 18 U.S.C. 2311. The United States Sentencing Commission is to review the sentencing guidelines application to violations of 18 U.S.C. 659 and 2311. The Attorney General is to see that cargo theft information is included in the Uniform Crime Reports and to report annually to Congress on law enforcement activities relating to theft from interstate or foreign shipments in violations of 18 U.S.C. 659.

### **Section 308. Stowaways.**

Stowing away on a vessel or an aircraft is a federal crime; offenders are subject to imprisonment for not more than one year, 18 U.S.C. 2199. Section 308 increases the penalty for stowing away from imprisonment for not more than one year to not more than five years (not more than 20 years if the offense is committed with the intent to inflict serious injury upon another or if serious injury to another results; or if death results, by death or imprisonment for any term of years or for life), proposed 18 U.S.C. 2199. Unlike the House bill, the “death results” capital punishment provision of the Conference bill is only triggered if the offender intended to cause a death, proposed 18 U.S.C. 2199(3).

### **Section 309. Port Security Bribery.**

Bribery of a federal official is punishable by imprisonment for not more than 15 years, 18 U.S.C. 201; many federal crimes of terrorism carry maximum penalties of imprisonment for not more than 20 years or more.<sup>135</sup> Those who aid and abet or conspire for the commission of such crimes are subject to sanctions.<sup>136</sup>

Section 309 makes it a federal crime to bribe any individual (private or public) with respect to various activities within any secure or restricted area or seaport — with the intent to commit international or domestic terrorism (as defined in 18 U.S.C. 2331). Offenders face imprisonment for not more than 15 years, proposed 18 U.S.C. 226 (the maximum under the House bill was 20 years).

### **Section 310. Smuggling Goods Into the United States.**

As a general rule, smuggling is punishable by imprisonment for not more than five years, 18 U.S.C. 545. Section 310 increases the penalty for smuggling to imprisonment for not more than 20 years, proposed 18 U.S.C. 545.

### **Section 311. Smuggling Goods From the United States.**

The penalty for smuggling goods into a foreign country by the owners, operators, or crew of a U.S. vessel is imprisonment for not more than five years, 18 U.S.C. 546. The same penalty applies to smuggling goods into the United States

<sup>135</sup> See, e.g., 18 U.S.C. 32 (destruction of aircraft, 20 years), 81 (arson, 25 years), 2332a (weapons of mass destruction, life imprisonment).

<sup>136</sup> 18 U.S.C. 2; *United States v. Pinkerton*, 340 U.S. 640 (1946).

(although the symmetry would disappear when section 310 makes smuggling into the U.S. a 20 year felony). Other penalties apply for smuggling or unlawfully exporting specific goods or materials out of the U.S. or into other countries.<sup>137</sup>

Section 311 creates a new federal crime which outlaws smuggling goods out of the United States; offenders face imprisonment for not more than 10 years, proposed 18 U.S.C. 554. Once smuggling from the U.S. is made a federal offense, corresponding changes in federal forfeiture and custom laws become a possibility.

Federal law proscribes laundering the proceeds of various federal crimes (predicate offenses), 18 U.S.C. 1956, 1957. Smuggling goods into the U.S. in violation of 18 U.S.C. 545 is a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The proceeds involved in financial transactions in violation of the money laundering statutes are generally subject to confiscation, 18 U.S.C. 981(a)(1)(A). Section 311 adds the new overseas smuggling crime, proposed 18 U.S.C. 554, to the money laundering predicate offense list, proposed 18 U.S.C. 1956(c)(7)(D).

Federal law calls for the confiscation of goods smuggled into the United States and of the conveyances used to smuggle them in, 19 U.S.C. 1595a. Section 311 calls for the confiscation of goods smuggled out of the U.S. and of any property used to facilitate the smuggling, proposed 19 U.S.C. 1595a(d).

It is a federal crime to remove property from the custody of the Customs Service. Offenders are punishable by imprisonment for not more than two years, 18 U.S.C. 549. Section 311 increases the penalty to imprisonment for not more than 10 years, proposed 18 U.S.C. 549.

### **Title III House Proposals Dropped in Conference.**

Two sections found in the House bill do not appear in the Conference bill. Section 309 of the House bill that increased sanctions for failure to comply with shipping manifest request requirements was dropped. Section 304 of the House bill that made it clear that the prohibition on attacks on mass transit covered attacks on passenger vessels became part of section 111 of Conference bill that rewrites 18 U.S.C. 1992 (train wrecking) and merges it with 18 U.S.C. 1993 (attacks on mass transit).

### **Title IV: Terrorism Financing**

The bill the Senate sent to conference had no money laundering provisions; the bill the House sent had several which appear in the Conference bill either as amended or as passed by the House prior to conference. The conferees inserted a new provision, unknown to either of the bills that entered conference, that might be construed to permit pre-trial asset freezes in certain civil forfeiture cases made part of the property owner's criminal trial.

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<sup>137</sup> See, e.g., 31 U.S.C. 5332 (bulk cash), 21 U.S.C. 953 (controlled substances), 18 U.S.C. 553 (stolen motor vehicles).

### **Section 401. Short Title.**

The short title of Title IV is the “Combating Terrorism Financing Act of 2005.”

### **Section 402. International Emergency Economic Powers Act Penalties.**

The International Emergency Economic Powers Act, 50 U.S.C. 1701-1707, grants the President the power to impose economic restrictions “to deal with unusual and extraordinary [external] threats to the national security, foreign policy, or economy of the United States,” 50 U.S.C. 1701(a). The authority has been invoked among other instances to block Iranian assets, Exec. Order No. 12170, 44 Fed.Reg. 65729 (Nov. 1979); to prohibit trade and certain other transactions with Libya, Exec. Order No. 12543, 51 Fed.Reg. 875 (Jan. 7, 1986); to impose economic sanctions on countries found to be contributing to the proliferation of weapons of mass destruction, Exec. Order No. 12938, 59 Fed. Reg. 59099 (Nov. 14, 1994); to block the assets and prohibit financial transactions with significant narcotics traffickers, 60 Fed.Reg. 54579 (Oct. 21, 1995); and to block the property and prohibit transactions with persons who commit, threaten to commit, or support terrorism, Exec. Order No. 13224, 66 Fed.Reg. 49079 (Sept. 23, 2001).

Violations of presidential orders or related regulations issued under the act, including but not limited to those that bar financial dealings with designated terrorists and terrorist groups, are punishable by a civil penalty of not more than \$10,000 and by imprisonment for not more than 10 years, 50 U.S.C. 1705.

The Conference bill carries forward the provisions of the House bill which increased the maximum term of imprisonment to 20 years and changed the maximum civil penalty to \$50,000, proposed 50 U.S.C. 1705.

### **Section 403. Terrorist Money Laundering.**

**RICO.** The federal Racketeer Influenced and Corrupt Organizations (RICO) law imposes severe penalties (up to 20 years imprisonment) for acquiring or operating an enterprise through the commission of a pattern of other crimes (predicate offenses), 18 U.S.C. 1961-1965. One federal money laundering statute, prohibits, among other things, using the funds generated by the commission of a predicate offense in a financial transaction designed to conceal the origin of the funds or promote further predicate offenses, 18 U.S.C. 1956. A second statute condemns financial transactions involving more than \$10,000 derived from a predicate offense, 18 U.S.C. 1957. Crimes designated RICO predicate offenses automatically qualify as money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A), 1957(f)(3). Property associated with either a RICO or money laundering violation is subject to confiscation, but RICO forfeiture requires conviction of the property owner, 18 U.S.C. 1963, money laundering forfeiture does not, 18 U.S.C. 1956, 1957, 981.

It is a federal crime to operate a business that transmits money overseas either directly or indirectly, without a license, or for a licensed business to either fail to comply with applicable Treasury Department regulations or to transmit funds that it knows will be used for, or were generated by, criminal activities, 18 U.S.C. 1960.

The Conference bill, like the House bill, adds 18 U.S.C. 1960 (money transmitters) to the RICO predicate offense list and consequently to the money laundering predicate offense list, proposed 18 U.S.C. 1961(1). The House version also added 8 U.S.C. 1324a (employing aliens) to the RICO list; the Conference bill does not.

**Direct Money Laundering Predicates.** Nor did the conferees accept addition of 42 U.S.C. 408 (misuse of a social security number) to the money laundering predicate offense list as the House version had proposed. The conferee's handling of related House proposals is less clear. Section 403(b) of the House bill reenacted two provisions of prior law. The Conference bill reenacts only one; the Conference report states that the bill reenacts both.

Section 403(b) of the House bill stated, "Section 1956(c)(7)(D) of title 18, United States Code, is amended by — (1) inserting, ‘, or section 2339C (relating to financing of terrorism)' before ‘of this title'; and (2) striking ‘or any felony violation of the Foreign Corrupt Practices Act' and inserting “any felony violation of the Foreign Corrupt Practices Act, or any violation of 208 of the Social Security Act [42 U.S.C. 408] (relating to obtaining funds through misuse of a social security number).”

Both the addition of section 2339C and the grammatical charge relating to the Foreign Corrupt Practices Act (dropping the “or” before the reference) are redundant. The Intelligence Reform and Terrorism Prevention Act made the Foreign Corrupt Practices related grammatical fix, 118 Stat. 3774 (2004). Section 2339C is already among the offenses found in the definition of federal crimes of terrorism, 18 U.S.C. 2332b(g)(5)(B), all of which are automatically RICO predicates and thus money laundering predicates as well, 18 U.S.C. 1961(1)(G).

The Conference bill states, "Section 1956(c)(7)(D) of title 18, United States Code, is amended by striking ‘or any felony violation of the Foreign Corrupt Practices Act' and inserting “any felony violation of the Foreign Corrupt Practices Act,” proposed 18 U.S.C. 1956(c)(7)(D). Thus, in its text the Conference bill drops the House proposal regarding the Social Security offense, 42 U.S.C. 408, and the redundant terrorism offense, 18 U.S.C. 2339C, from the proposal to amend the money laundering list but carries forward the redundant grammatical fix. The Conference report indicates, however, that the conferees intended to carry forward the terrorism offense as well, “Subsection (b) directly adds as money laundering predicates the new terrorist-financing offense in 18 U.S.C. 2339C,” H.Rept. 109-333, at 106 (2005).

**Investigative Jurisdiction.** The Conference bill carries forward the House language concerning the money laundering investigative jurisdiction of various components of the Department of Homeland Security, proposed 18 U.S.C. 1956(e), 1957(e).<sup>138</sup> Clarification might be thought desirable for purposes of coordination, to

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<sup>138</sup> “Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, *with respect*

avoid duplication of efforts, and because investigative agencies share in the distribution of forfeited property to the extent of their participation in the investigation that led to confiscation, 18 U.S.C. 981(d), (e); 19 U.S.C. 1616a.

### **Section 404. Forfeiture for Foreign Crimes.**

The property of individuals and entities that prepare for or commit acts of international terrorism against the United States or against Americans is subject to federal confiscation, 18 U.S.C. 981(a)(1)(G). Criminal forfeiture is confiscation that occurs upon conviction for a crime for which forfeiture is a consequence, e.g., 18 U.S.C. 1963 (RICO). Civil forfeiture is confiscation accomplished through a civil proceeding conducted against the “offending” property based on its relation to a crime for which forfeiture is a consequence, e.g., 18 U.S.C. 981. Criminal forfeiture is punitive; civil forfeiture is remedial, *Calderon-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 683-88 (1974). A convicted defendant may be required to surrender substitute assets if the property subject to criminal forfeiture is located overseas or otherwise beyond the reach of the court, 18 U.S.C. 853(p). Civil forfeiture ordinarily requires court jurisdiction over the property, but when forfeitable property is held overseas in a financial institution that has a correspondent account in this country the federal government may institute and maintain civil forfeiture proceedings against the funds in the interbank account here, 18 U.S.C. 9871(k).

Article III, section 2 of the Constitution declares in part that, “no attainder of treason shall work corruption of blood, or forfeiture of estate except during the life of the person attainted,” U.S. Const. Art. III, §3, cl.2. Forfeiture of estate is the confiscation of property simply because it is the property of the defendant, without any other connection to the crime for which gives rise to the forfeiture. The constitutional provision applies only in cases of treason, but due process would seem likely to carry the ban to forfeiture of estate incurred as a result of other crimes, particularly lesser crimes.<sup>139</sup> The assumption must be hypothetical because with a single Civil War exception until very recently federal law only called for the forfeiture of property that had some nexus to the confiscation-triggering crime

*to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency,” proposed 18 U.S.C. 1956(e)(language added by the Conference bill in italics); proposed 18 U.S.C. 1957(e) has similar language.*

<sup>139</sup> *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir. 1980) (“We would agree. . . that if §1963 revives forfeiture of estate as that concept was expressed in the Constitution it is almost certainly invalid because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of lesser crimes”).

beyond mere ownership by the defendant.<sup>140</sup> Subparagraph 981(a)(1)(G) calls for the confiscation the property of individuals and entities that engage in acts of terrorism against the United States or Americans, 18 U.S.C. 981(a)(1)(G)(i), and under separate clauses any property derived from or used to facilitate such misconduct, 18 U.S.C. 981(a)(1)(G)(ii),(iii). As yet, there no reported cases involving 18 U.S.C. 981(a)(1)(G)(i).

The Conference bill, like the House bill, authorizes the federal government to confiscate under civil forfeiture procedures all property of any individual or entity planning or committing an act of international terrorism against a foreign nation or international organization without any further required connection of the property to the terrorist activity other than ownership.<sup>141</sup> The section contemplates forfeiture of property located both here and abroad; for in refers to “all assets, foreign and domestic, but with respect to property located outside of the United States, it requires an act in furtherance of the terrorism to “have occurred within the jurisdiction of the United States,” proposed 18 U.S.C. 981(a)(1)(G)(iv). It is unclear whether the jurisdiction referred to is the subject matter jurisdiction or territorial jurisdiction of the United States or either or both. The due process shadow of Article III, section 3, clause 2 may limit the reach of the proposal to property with some nexus other than ownership to the terrorist act.

### **Section 405. Application of the Money Laundering Statute to Dependent Transactions.**

Money laundering in violation of 18 U.S.C. 1956 may take either of two forms (1) engaging in a prohibited financial transaction involving the proceeds of a predicate offense, 18 U.S.C. 1956(a)(1), or (2) internationally transporting, transmitting, or transferring the proceeds of a predicate offense, 18 U.S.C. 1956(a)(2). The House bill presented to the conferees extended both the financial transaction and the international transmission offenses to include related, parallel transactions and transmissions, proposed 18 U.S.C. 1956(j)(1), (2). The Conference

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<sup>140</sup> Under the Confiscation Act all the property of Confederate army and naval officers was forfeited, 12 Stat. 589 (1862), but owing to the constitutional reservations of President Lincoln, the forfeiture statute was followed by another declaring that confiscation would only apply during the life time of a member of the Confederate armed forces, 12 Stat. 627 (1862). The Supreme Court read the two together and as a matter statutory construction held that a life estate in the property of the former Confederate naval officer at issue was all that was subject to confiscation, *Bigelow v. Forest*, 76 U.S. 339, 350 (1869).

<sup>141</sup> “The following property is subject to forfeiture to the United States . . . (G) All assets, foreign or domestic . . . (iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government. Where the property sought forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States,” proposed 18 U.S.C. 981(a)(1)(G)(iv).

bill enlarges only the financial transaction proscription, proposed 18 U.S.C. 1956(a)(1).<sup>142</sup>

As the Conference report explains, the amendment addresses a feature of the often informal networks for transfer money overseas.

Alternative remittance systems are utilized by terrorists to move and launder large amounts of money around the globe quickly and secretly. These remittance systems, also referred to as “hawala” networks, are used throughout the world, including the Middle East, Europe, North America and South Asia. These systems are desirable to criminals and non-criminals alike because of the anonymity, low cost, efficiency, and access to underdeveloped regions. The United States has taken steps to combat the “hawala” networks by requiring all money transmitters, informal or formal, to register as money service businesses.

Under current Federal law, a financial transaction constitutes a money laundering offense only if the funds involved in the transaction represent the proceeds of some criminal offense. . . There is some uncertainty, however, as to whether the “proceeds element” is satisfied with regard to each transaction in a money laundering scheme that involves two or more transactions conducted in parallel, only one of which directly makes use of the proceeds from unlawful activity. For example, consider the following transaction: A sends drug proceeds to B, who deposits the money in Bank Account 1. Simultaneously or subsequently, B takes an equal amount of money from Bank Account 2 and sends it to A, or to a person designated by A. The first transaction from A to B clearly satisfies the proceeds element of the money laundering statute, but there is some question as to whether the second transaction — the one that involves only funds withdrawn from Bank Account 2 does so as well. The question has become increasingly important because such parallel transactions are the technique used to launder money through the Black Market Peso Exchange and “hawala” network, H.Rept. 109-333, at 107 (2005).

### **Sections 406-408. Technical Amendments.**

As suggested in the bill the House sent to conference, the Conference bill corrects a number of typographical and grammatical errors in existing law including changing the reference in section 322 of the USA PATRIOT Act, 115 Stat. 315 (2001), from 18 U.S.C. 2466(b) to 28 U.S.C. 2466(b); changing the phrase “foreign bank” to “foreign financial institution” in 18 U.S.C. 981(k)(relating to forfeiture and interbank accounts); correcting a reference to the Intelligence Reform and Terrorism Prevention Act, proposed 31 U.S.C. 5318(n)(4)(A); capitalizing a reference in the Intelligence Reform and Terrorism Prevention Act (amending 18 U.S.C. 2339C rather than 18 U.S.C. 2339c); and codifying the forfeiture procedure passed as section 316 of the USA PATRIOT Act, 115 Stat. 309 (2001), proposed 18 U.S.C. 987.

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<sup>142</sup> “For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement,” proposed 18 U.S.C. 1956(a)(1).

## **Section 406. Civil Forfeiture Pre-trial Freezes and Restraining Orders.**

Federal law permits pre-trial restraining orders to freeze property sought in criminal forfeiture cases, 21 U.S.C. 853(e), and pre-trial restraining orders or the appointment of receivers or conservators in civil forfeiture cases, 18 U.S.C. 983(j). In money laundering civil penalty and forfeiture cases, it also permits restraining orders and the appointment of receivers under somewhat different, less demanding procedures with respect to the property of foreign parties held in this country, 18 U.S.C. 1956(b). The Conference bill, like the House version of the bill before it, removes the requirement that the property be that of a foreign party, proposed 18 U.S.C. 1956(b)(3),(4).

## **Section 406. Conspiracy Penalties.**

It is a federal crime to destroy or attempt to destroy commercial motor vehicles or their facilities, 18 U.S.C. 33. Offenders face imprisonment for not more than 20 years, id. It is also a federal crime to cause or to attempt to cause more than \$100,000 worth of damage to an energy facility, 18 U.S.C. 1366. Again, offenders face imprisonment for not more than 20 years, id. As a general rule, conspiracy to commit these or any other federal crime is punishable by imprisonment for not more than five years, 18 U.S.C. 371, and conspirators are liable for the underlying offense and any other offense committed by any of co-conspirators in the foreseeable furtherance of the criminal scheme, *United States v. Pinkerton*, 340 U.S. 640 (1946).

For several federal crimes, instead of the general five-year penalty for conspiracy, section 811 of the USA PATRIOT Act used the maximum penalty for the underlying offense as the maximum penalty for conspiracy to commit the underlying offense, 115 Stat. 381-82 (2001). House bill suggested that the same should be done with conspiracies to violate 18 U.S.C. 33 (destruction of motor vehicles) and 18 U.S.C. 1366 (damage an energy facility), and the conferees agree, proposed 18 U.S.C. 33, 1366.

## **Section 409. Laundering the Proceeds Foreign Terrorist Training.**

Federal law prohibits laundering the proceeds of various predicate offenses, 18 U.S.C. 1956; in addition to other criminal penalties, property associated with such laundering is subject to confiscation, 18 U.S.C. 981(a)(1)(A). Receipt of military training from a foreign terrorist organization is also a federal crime, 18 U.S.C. 2339D. Section 112 of the Conference bill makes 18 U.S.C. 2339D a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B). Federal crimes of terrorism are RICO predicate offenses by definition, 18 U.S.C. 1961(1)(G). RICO predicate offenses are by definition money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A). Section 409 of the Conference bill makes 18 U.S.C. 2339D a money laundering predicate offense directly, 18 U.S.C. 1956(c)(7)(D). It is not clear why the duplication was thought necessary.

## **Section 410. Uniform Procedures for Criminal Forfeitures.**

The Conference bill contains an amendment to 28 U.S.C. 2461(c), for which there is no explanation in the conference report. Nor does the amendment appear in either the two versions of H.R. 3199 sent to conference. Nor does the amendment appear to have been included in other legislative proposals and thus has not heretofore been the beneficiary of examination in committee or on the floor. The change is captioned “uniform procedures for criminal forfeitures,” but it is not facially apparent precisely how the procedures for various criminal forfeitures are disparate or how the amendment makes them more uniform. Part of the difficulty flows from the fact that both the section 2461(c) and the Conference bill amendment are somewhat cryptic. Nevertheless, it seems crafted to make a default procedure into an exclusive procedure.

In its present form 28 U.S.C. 2461(c) states:

If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.

The Conference bill amends the section 2461(c) to read:

If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act, proposed 18 U.S.C. 2461(c).

A casual reading of the section 2461(c) might suggest that it only applies in the case of a *criminal* forfeiture statute which fails to indicate what procedure should be used to accomplish confiscation. In fact, as the conference amendment states more clearly, section 2461(c) allows for confiscation under its criminal forfeiture procedures where civil forfeiture is authorized by statute but criminal forfeiture otherwise is not.<sup>143</sup> On its face, however, it does not allow the government to merge every civil forfeiture with the criminal prosecution of the property owner. In its

<sup>143</sup> *United States v. Razmilovic*, 419 F.3d 134,136 (2d Cir. 2005)(“Section 2461(c) thus authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the government to combine criminal conviction and criminal forfeiture as a consolidated proceeding”).

present form, section 2461(c) is only available if there is no other criminal forfeiture counterpart for the civil forfeiture.<sup>144</sup> Under the Conference bill the distinction no longer exists.

Moreover, since section 2461(c) speaks of treating civil forfeitures as criminal forfeitures after conviction, some courts have held that pre-trial freeze orders available in other criminal forfeiture cases may not be invoked in the case of a section 2461(c) “gap filler.”<sup>145</sup> It is unclear whether the conferees intended the bill change this result as well. On one hand, the language of conviction still remains. On the other hand, the description of the role of 21 U.S.C. 853 (which authorizes pre-trial restraining orders) may signal a different result. The current language is fairly clear, the procedures of section 853 come into play after conviction: “upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853),” 28 U.S.C. 2461(c). The statement in the Conference bill is less conclusive: “The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding,” proposed 28 U.S.C. 2461(c). The change in language suggests that a change in construction may have been intended.

Critics might suggest that a more thorough consideration or at least more complete explanation of the full ramifications of the proposal would have been preferable.

## Title V: Miscellanea

Title V of the Conference bill contains provisions added in conference and not previously included in either House or Senate version of H.R. 3199, some of which — like the habeas amendments in the case of state death row inmates, or the adjustments in the role of the Office of Intelligence Policy and Review in the FISA process, or the new Secret Service offenses with unstated constitutional foundations — may prove controversial.

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<sup>144</sup> 18 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, . . . but no specific statutory provision is made for criminal forfeiture upon conviction . . .”); *United States v. Causey*, 309 F.Supp.2d 917, 920 (S.D. Tex. 2004)(“Section 981 [relating to civil forfeiture] forms the basis for criminal forfeiture through the application of 28 U.S.C. 2461(c), which allows criminal forfeiture to be sought anytime there is a civil forfeiture provision but no corresponding criminal forfeiture statute”); *United States v. Schlesinger*, 396 F.Supp.2d 267, 275 (E.D.N.Y. 2005) (“Constructing the statute in this manner makes §2461(c) a broad ‘gap filler’ that applies whenever civil forfeiture is permitted. In sum, when there is no provision for criminal forfeiture, the government may use a civil forfeiture provision if it includes such allegation in the indictment. In instances where there is a specific criminal forfeiture provision — that specific provision and the procedures that it sets forth — and not the civil forfeiture provision will apply”).

<sup>145</sup> *United States v. Razmilovic*, 419 F.3d 134,137 (2d Cir. 2005). Note that in some civil forfeiture cases, the government is entitled to a pre-trial freeze order, 18 U.S.C. 983(j).

## **Section 501. Justice Department Residency Requirements.**

United States Attorneys and Assistant United States Attorneys must live within the district for which they are appointed, except in the case of the District of Columbia and the Southern and Eastern Districts of New York, 28 U.S.C. 545. The Attorney supervises and directs litigation in which the United States has an interest, 28 U.S.C. 516-519. He enjoys the authority to marshal, move, and direct the officers, employees, or agencies of the Department of Justice to this end, 28 U.S.C. 509, 510, 547. The Conference bill allows the Attorney General to waive the residency requirement with respect to U.S. Attorneys or Assistant U.S. Attorneys who have been assigned additional duties outside the districts for which they were appointed.<sup>146</sup> The conference report notes that amendment will allow Justice Department personnel to be assigned to Iraq, H.Rept. 109-333 at 109 (2005), but does not explain why the authority is made retroactive to February 1, 2005.

## **Section 502. Appointment of U.S. Attorneys.**

Existing law permits the Attorney General to temporarily fill vacancies in the office of United States Attorney, 28 U.S.C. 546. If a replacement has not been confirmed and appointed within 120 days, the district court is authorized to make a temporary appointment, 28 U.S.C. 546(d). The Conference bill repeals the authority of the court and permits the Attorney General's temporary designee to serve until the vacancy is filled by confirmation and appointment, proposed 28 U.S.C. 546(c).

## **Section 503. Presidential Succession: Homeland Security Secretary.**

The heads of the various federal departments come within the line of presidential succession, 3 U.S.C. 19(d)(1). The Conference bill adds the Secretary of the Department of Homeland Security to the list following the Secretary of Veterans Affairs, id.

## **Section 504. Confirmation of the Director of BATFE.**

The Attorney General appoints the Director the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), 6 U.S.C. 531(a)(2). The Conference bill vests his appointment in the President with the advice and consent of the Senate, proposed 6 U.S.C. 531(a)(2).

## **Section 505. Qualifications for U.S. Marshals.**

The President appoints the marshal in each federal judicial district with the advice and consent of the Senate, 28 U.S.C. 561. There are no statutory

<sup>146</sup> Proposed 28 U.S.C. 545(a) (“ . . . Pursuant to an order from the Attorney General or his designee, a United States attorney or an assistant United States attorney may be assigned dual or additional responsibilities that exempt such officer from the residency requirement in this subsection for a specific period of time established by the order and subject to renewal.”).

qualifications. The Conference bill describes a fairly demanding set of minimum qualifications that each marshal “should have,”<sup>147</sup> which the report characterizes as clarifications.<sup>148</sup> Some may consider this an intrusion upon the constitutional prerogatives of the President. The Constitution does confer upon him the power to nominate and, with the advice and consent of the Senate, to appoint officers of the United States, U.S. Const. art. II, §2. It might be thought that to impose minimum qualifications for appointment impermissibly limits the President’s power to nominate. But with few exceptions, the offices in question are creatures of statute. They exist by exercise of Congress’ constitutional authority “to make all laws necessary and proper for carrying into execution” the constitutional powers of the Congress, the President or Government of the United States, U.S. Const. art. I, §8, cl.18. The imposition of minimum qualifications is consistent with long practice as to which the Supreme Court has observed:

Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of *reasonable and relevant qualifications* and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation — all except as otherwise provided by the Constitution. *Myers v. United States*, 272 U.S. 52, 129 (1926)(emphasis added).<sup>149</sup>

<sup>147</sup> “Each marshal appointed under this section should have — (1) a minimum of 4 years of command-level law enforcement management duties, including personnel, budget, and accountable property issues, in a police department, sheriff’s office or Federal law enforcement agency; (2) experience in coordinating with other law enforcement agencies, particularly at the State and local level; (3) college-level academic experience; and (4) experience in or with county, State, and Federal court systems or experience with protection of court personnel, jurors, and witnesses,” proposed 28 U.S.C. 561(i).

<sup>148</sup> H.Rept. 109-333 at 109 (2005)(“Section 505 of the conference report is a new section. This section clarifies the qualifications individuals should have before joining the United States Marshals”).

<sup>149</sup> See also, Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUMIA LAW REVIEW 353, 391 (1927)(“From the first Congress has exercised its power under the ‘necessary and proper’ clause to fix the qualifications of officers, not only in respect to inferior offices but also in respect to superior offices, and this notwithstanding that in so doing it has obviously restricted the President’s power of nomination”); 2 ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 35 (3d ed. 1999)(“Congress can limit the President’s power to nominate by imposing qualifications that the appointee for the office must possess”); *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003)(“This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given the Constitution’s provisions”). Justice Brandeis in *Myers* footnotes literally hundreds of instances dating from the First Congress that in Congress set minimum qualifications for various public office holders, 272 U.S. at 265 n.35 -274 n.56.

The bill's terminology leaves some doubt whether it is intended to require or merely encourage the nomination of candidates exhibiting the statutory qualifications ("each marshal appointed under this section should have . . ."). Perhaps more perplexing is why the conferees deemed this particular office and not others appropriate for such treatment. The office has existed since the dawn of the Republic, 1 Stat. 87 (1789), without statement of required or preferred qualifications. Arguably comparable or more significant offices within the Department of Justice face no similar provisions. No such provisions attend the appointment of U.S. Attorneys, 28 U.S.C. 541; the Director the Federal Bureau of Investigation, 28 U.S.C. 532; the Director of the Marshals Service, 28 U.S.C. 561; or even the Attorney General himself, 28 U.S.C. 503. Even when the bill puts its hand anew to the appointment of an arguable comparable position — the appointment of the Director of BATFE, proposed 6 U.S.C. 531, *supra* — it says nothing of minimum qualifications. Of course, the requirements seem relevant and it is difficult to argue that any federal office should not be filled with the most highly qualified individual possible.

### **Section 506. New Assistant Attorney General for National Security.**

**Background.** The presidential Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction recommended that "[t]he Department of Justice's primary national security elements — the Office of Intelligence Policy and Review, and the Counterterrorism and Counterespionage sections [of the Criminal Division] — should be placed under a new Assistant Attorney General for National Security."<sup>150</sup> The Commission felt the organizational scheme might be awkward and that perhaps the system would benefit from a check on Office of Intelligence Policy and Review's rejection of FISA applications as insufficient.<sup>151</sup>

<sup>150</sup> The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, 471-73 (Mar. 31, 2005), available on Jan. 6, 2006 at, [[http://www.wmd.gov/report/wmd\\_report.pdf](http://www.wmd.gov/report/wmd_report.pdf)].

<sup>151</sup> "The Justice Department's three primary national security components are located in different divisions, with no individual below the Deputy Attorney General who can supervise all three. The Office of Intelligence Policy and Review (OIPR) is responsible for FISA requests, representing the Department of Justice on intelligence-related committees, and advising the Attorney General on 'all matters relating to the national security activities.' It is independent of any division and reports directly to the Deputy Attorney General. In contrast, both the Counterterrorism and Counterespionage sections are located in the Criminal Division, but they each report to two *different* Deputy Assistant Attorney Generals. If there is method to this madness, neither we, nor any other official with whom we spoke, could identify it.

"There is reason to believe that the this awkward (and outdated) organizational scheme has created problems between the Justice Department and the Intelligence Community. In our classified report we describe one such problem that cannot be discussed in our unclassified report.

"We believe that bringing the Office of Intelligence Policy and Review closer to its operational counterparts like the Counterespionage and Counterterrorism sections would give the office better insight into actual intelligence practices and make it better attuned to operational needs. Attorneys in the Counterterrorism and Counterespionage sections

Critics might suggest that curtailing the independence of the Office of Intelligence Policy and Review (OIPR) with an eye to less rigorous examination of FISA applications is likely to have an adverse impact. They might argue that adding another layer of review to the FISA application process can only bring further delays to a process the Administration has continuously sought to streamline. In the same vein, should the judges of the FISA Court conclude that the OIPR has been shackled and ceased to function as an independent gatekeeper for the Court, they might examine applications more closely and feel compelled to modify or reject a greater number; further contributing to delay or so it might be said.

Be that as it may, the President has notified various administration officials that he concurs in the Commission's recommendation.<sup>152</sup> Section 441 of the Intelligence Authorization Act for Fiscal Year 2006, S. 1803, as reported by the Senate Select Committee on Intelligence, contained similar provisions.<sup>153</sup>

The Conference bills makes the following provisions for the new Assistant Attorney General:

- Assistant Attorney General (AAG) is to be designated by the President and presented to the Senate for its advice and consent, proposed 28 U.S.C. 507A(a); cf., H.Rept. 109-142 at 31;
- AAG serves as head of the DoJ National Security Division, as primary DoJ liaison with DNI, and performs other duties as assigned, proposed 28 U.S.C. 507A(b);
- the Attorney General is to consult with the DNI before recommending a nominee to be AAG, proposed 50 U.S.C. 403-6(c)(2)(C);
- the Attorney General may authorize the AAG to perform the Attorney General's FISA-related duties, proposed 50 U.S.C. 1801(g);

routinely work alongside FBI agents and other intelligence officers. By contrast, OIPR is largely viewed within the Department as an ‘assembly line operation not requiring any special grounding in the facts of a particular matter.’ OIPR’s job is to process and adjudicate FISA requests — not to follow a case from start to completion. One of the advantages of placing all three national security components under a single Assistant Attorney General is that they will see themselves as acting in concert to serve a common mission.

“The Bellows Report [*Final Report of the Attorney General’s Review Team on the Handling of the Los Alamos National Laboratory Investigation*] identifies a further reason to have a single individual below the Deputy Attorney General to supervise the OIPR: the need to have a single individual who is knowledgeable about FISA to review RISA applications that are rejected by OIPR. *Id.* at pp.767-768. The lack of such an individual in the Wen Ho Lee investigation caused serious problems. An Assistant Attorney General for National Security would fit the bill perfectly,”*Id.* at 472, 482 n.94 (the last paragraph quoted above appears as footnote 94 in the *Report*).

<sup>152</sup> S.Rept. 109-142, at 31 (2005)(“The President endorsed this recommendation in a June 29, 2005, memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Secretary of Homeland Security, Director of OMB, DNI, Assistant to the President for National Security Affairs, and Assistant to the President for Homeland Security and Counterterrorism”).

<sup>153</sup> See generally, H.Rept. 109-333, at 109 (2005); H.Rept. 109-142, at 31-33 (2005).

- AAG may approve application for a communications interception (wiretap) order under the Electronic Communications Privacy Act (Title III), proposed 18 U.S.C. 2516(1);\*<sup>154</sup>
- the Attorney General may authorize the AAG to approve admission into the witness protection program, proposed 18 U.S.C. 3521(d)(3);\*
- AAG must provide briefings for the DoJ officials or their designee of Division cases involving classified information, proposed 18 U.S.C. App. III 9A(a);\*
- AAG replaces OIPR for purposes of advising the Attorney General on the development of espionage charging documents and related matters, proposed 28 U.S.C. 519 note;\*
- the Attorney General may authorize the AAG to approve certain undercover operations, proposed 28 U.S.C. 533 note;\*
- AAG joins those whom the Attorney General consult concerning a state application of emergency law enforcement assistance, proposed 42 U.S.C. 10502(2)(L);\*
- the National Security Division headed by the AAG consists of the OIPR, the counterterrorism and counterespionage sections, and any other entities the Attorney General designates, proposed 28 U.S.C. 509A;
- Division employees are barred from engaging in political management or political campaigns, proposed 5 U.S.C. 7323(b)(3);\*
- subject to a rule change by the Senate, the Senate Select Committee on Intelligence enjoys 20 day sequential referral of AAG nominees, proposed section 17 of S.Res. 94-400 of the Standing Rules of the Senate, *Senate Manual* §94 (2002).

### **Section 507. Habeas Corpus in State Capital Cases.**

Federal law provides expedited habeas corpus procedures in the case of state death row inmates in those states that qualify for application and have opted to take advantage of the procedures, 28 U.S.C. ch. 154. As the Supreme Court stated, “Chapter 154 will apply in capital cases only if the State meets certain conditions. A state must establish ‘a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel’ in state postconviction proceedings, and ‘must provide standards of competency for the appointment of such counsel,’” *Calderon v. Ashmus*, 523 U.S. 740, 743 (1998). Thus far apparently, few if any states have sought and been found qualified to opt in.<sup>155</sup>

<sup>154</sup> \* Provisions not found in S. 1803.

<sup>155</sup> At least for a short period of time Arizona was qualified to opt in, *cf. Spears v. Stewart*, 283 F.3d 992, 996 (9th Cir. 2002)(denying rehearing en banc) (“The three judge panel . . . determined that although (a) the question whether Arizona had opted-in to the short-fuse habeas scheme provided in Chapter 154 . . . was entirely irrelevant to the outcome of the case before it; (b) the linchpin provision for the procedures by which Arizona had once sought to opt-in under Chapter 154 had already been repealed by the state; (c) the state did not even comply with its own procedures in the case before the panel; (d) Arizona was unquestionably not in compliance with Chapter 154 at the time the appeal was heard; (e) in fact, the state had never at any time effectively complied with its short-lived procedures; and (f) no other state in the nation has ever been held to have successfully opted-in under Chapter 154, the panel would seize this opportunity to issue an advisory opinion stating that the no-longer-existent Arizona procedures were in compliance with Chapter 154’s requirements”) (citing, *Ashmus v. Woodford*, 202 F.3d 1160, 1160 (9th Cir. 2000) (California has not opted-in); *Harris v. Bowersox*, 184 F.3d 744, 7848 (8th Cir. 1999) (Missouri has not

The proposals in the Conference bill are reminiscent of some of the features of more general habeas proposals introduced by both the House and Senate under the title, the “Streamlined Procedures Act,” H.R. 3035 and S. 1088. Both free standing bills have been the subject of Congressional hearings, but have yet to clear committee.

Critics of existing law imply that the states have been unable to take advantage of the expedited capital procedures only because the courts have a personal stake in the outcome. The solution, they contend, is the amendment found in the Conference bill and in slightly different form in the free standing bills — allowing the Attorney General to determine whether a state qualifies, permit the determination to have retroactive effect, and allow review by the federal appellate court least likely to have an interest in the outcome, the U.S. Court of Appeals for the D.C. Circuit, proposed 28 U.S.C. 2261(b), 2265.<sup>156</sup> Opponents of the proposal raise separation of powers issues and question whether the chief federal prosecutor or the courts are more likely to make an even handed determination of whether the procedures for providing capital defendants with qualified defense counsel are adequate.<sup>157</sup>

opted-in); *Duvall v. Reynolds*, 139 F.3d 768, 776 (10th Cir. 1998)(Oklahoma has not opted-in); *Hill v. Butterworth*, 941 F.Supp. 1129, 1146-147 (N.D.Fla. 1996), *vac'd on other grounds*, 147 F.3d 1333 (11th Cir. 1998)(Florida has not opted in); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vac'd on other grounds*, 105 F.3d 209 (5th Cir. 1997)(Texas has not opted-in); *Austin v. Bell*, 126 F.3d 843, 846 n.3 (6<sup>th</sup> Cir. 1997)(Tennessee has not opted-in); *Holloway v. Horn*, 161 F.Supp.2d 452, 478 n.11 (E.D.Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3d Cir. 2004)(Pennsylvania has not opted-in); *Smith v. Anderson*, 104 F.Supp. 2d 773, 786 (S.D.Ohio 2000)(Ohio has not opted-in); *Oken v. Nuth*, 30 F.Supp.2d 877, 879 (D.Md. 1998)(Maryland has not opted-in); *Tillman v. Cook*, 25 F.Supp.2d 1245, 1253 (D.Utah 1998)(Utah has not opted-in); *Weeks v. Angelone*, 4 F.Supp.2d 467, 506 n.4 (E.D.Va. 1998)(Virginia has not opted-in); *Ryan v. Hopkins*, 1996 WL 539220, at \*3-4 (D.Neb. 1969)(Nebraska has not opted-in)). Related cases include, *Grayson v. Epps*, 338 F.Supp.2d 699, 700-704 (S.D. Miss. 2004)(Mississippi has not opted-in); *Keel v. French*, 162 F.3d 263, 267 n.1 (4th Cir. 1998)(North Carolina has not opted-in); *High v. Head*, 209 F.3d 1257, 1262 n.4 (11th Cir. 2000)(Georgia does not claim to have opted-in); *Allen v. Lee*, 366 F.3d 319, 353 (4th Cir. 2004)(Luttig, J. dissenting)(noting that the Fourth Circuit has adopted by rule the section 2266 time lines).

<sup>156</sup> “[T]he SPA [Streamlined Procedures Act] also expands and improves the special expedited habeas procedures authorized in chapter 154 of the United States Code. The procedure are available to States that establish a system for providing high-quality legal representation to capital defendants. Chapter 154 sets strict time limits on Federal court action and places limits claims. Currently, however, the court that decides whether a State is eligible for chapter 154 is the same court that would be subject to its time limits. Unsurprisingly, these courts have proven resistant to chapter 154. The SPA would place the eligibility decision in the hands of a neutral party — the U.S. Attorney General, with review of his decision in the D.C. Circuit, which does not hear habeas appeals,” 151 CONG. REC. S554-41 (daily ed. May 19, 2005).

<sup>157</sup> “[T]he SPA intimates that courts can't objectively evaluate whether states meet the ‘opt-in’ provisions detailed in the AEDPA because their dockets are implicated in the timelines created by opt-in status. The legislation attempts to resolve this by empowering the chief prosecutor in the United States, the Attorney General, to make these decisions. Giving federal prosecutors control over even part of the federal judiciary's docket and decisionmaking authority would have serious implications for the separation of powers necessary for fair administration of criminal justice,” *Habeas Corpus Proceedings and*

Under the Conference bill, states would opt-in or would have opted-in as of the date, past or present, upon which the Attorney General determines they established or have established qualifying assistance of counsel mechanism, proposed 28 U.S.C. 2265. Opting-in to the expedited procedures of chapter 154 only applies, however, to instances in which “counsel was appointed pursuant to that mechanism [for the death row habeas petitioner], petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent,” proposed 28 U.S.C. 2261(b)(2). The standards of qualifying mechanism remain the same except that the Conference bill drops that portion of subsection 2261(d) which bars an attorney from serving as habeas counsel if he represented the prisoner during the state appellate process, proposed 28 U.S.C. 2261(d).

The bill establishes a different standard of review than the Streamlined Procedures bills would have. It subjects the Attorney General’s determination to *de novo* review before the D.C. Circuit, proposed 28 U.S.C. 2265(c)(3), whereas S. 1088 (§9) and H.R. 3035 (§9) would have permitted the Court to overturn the Attorney General’s determination only if it were “manifestly contrary to the law and an abuse of discretion.” All three bills extend the expedited time deadline for U.S. district court action on a habeas petition from a state death row inmate from 6 to 15 months (180 days to 450 days)(although the 60 days permitted the court for decision following completion of all pleadings, hearings, and submission of briefs remains the same), proposed 28 U.S.C. 2266(b).

In *McFarland v. Scott*, 512 U.S. 849, 859 (1994), the Supreme Court held that federal district courts might stay the execution of a state death row inmate upon the filing of a petition for the appointment of counsel but prior to the filing of a federal habeas petition in order to allow for the assistance of counsel in the filing the petition.

In an amendment described as overruling *McFarland*, H.Rept. 109-333, at 109 (2005), the Conference bill amends federal law to permit a stay in such cases of no longer than 90 days after the appointment of counsel or the withdrawal or denial of a request for the appointment of counsel, proposed 28 U.S.C. 2251(b).

## **Title VI: Secret Service**

The Secret Service provisions of the Conference bill closely resemble S. 1967 and were added to the bill during conference. They have several intriguing aspects including two proposals whose constitutional footings may be somewhat uncertain.

### **Section 601. Short Title.**

Section 601 designates Title VI the “Secret Service Authorization and Technical Modification Act of 2005.”

*Issues of Actual Innocence: Hearings Before the Senate Comm. on the Judiciary*, 109th Cong., 1st sess. (2005) (testimony of Bryan Stevenson, Executive Director of Equal Justice Initiative of Alabama, available on Jan. 6, 2006, at [http://judiciary.senate.gov/print\_testimony.cfm?id=1569&wit\_id=4458].

## **Protection of the President and Certain Other Federal Officials.**

**Section 602. Part I.** It is a federal crime:

- (1) to willfully and knowingly trespass in areas designated as temporary offices or residences for (or as restricted areas in places visited by or to be visited by) those under Secret Service protection, 18 U.S.C. 1752(a)(1);
- (2) to engage in disorderly conduct in or near such areas or places with the intent to and result of impeding or disrupting the orderly conduct of governmental business or functions there, 18 U.S.C. 1752(a)(2);
- (3) to willfully and knowingly block passage to and from such areas or places, 18 U.S.C. 1752(a)(3);
- (4) to willfully and knowingly commit an act of violence in such area or place, 18 U.S.C. 1752(a)(4); or
- (5) to attempt or conspire to do so, 18 U.S.C. 1752(a),(b).

Offenders are punishable by imprisonment for not more than six months and/or a fine of not more than \$5,000 (not more than \$10,000 for organizations), 18 U.S.C. 1752(b). Obstructing Secret Service officers in the performance of their protective duties is also a federal crime and is punishable by imprisonment for not more than one year and/or a fine of not more than \$1,000, 18 U.S.C. 3056(d).

The Conference bill increases the penalties for violation of section 1752 from imprisonment for not more than six months to imprisonment for not more than one year; unless the offense results in significant bodily injury<sup>158</sup> or the offender uses or carries a deadly or dangerous weapon during and in relation to the offense, in which case the offense is punishable by imprisonment for not more than 10 years, proposed 18 U.S.C. 1752(b). As a general rule applicable here, crimes punishable by imprisonment for not more than six months are subject as an alternative to a fine of not more than \$5,000; crimes punishable by imprisonment for not more than one year by a fine of not more than \$100,000 as an alternative; crimes punishable by imprisonment for more than one year by a fine of not more than \$250,000; and in each case organizations are subject to maximum fines that are twice the amount to which an individual might be fined, 18 U.S.C. 3571, 3559.

The bill also amends section 1752 to provide a uniform scienter element (willfully and knowingly) for each of the offenses prescribed there, proposed 18 U.S.C. 1752; only the disorderly conduct subsection now features a scienter element — with the intent to disrupt — other than willfully and knowingly, 18 U.S.C. 1752(a)(2).

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<sup>158</sup> “‘Significant bodily injury’ means bodily injury which involves a risk of death, significant physical pain, protracted and obvious disfigurement, or a protracted loss or impairment of the function of a bodily member, organ, or mental or sensory faculty,” 18 U.S.C. 2118(e)(3), proposed 1752(b)(1)(B).

## Special Events of National Significance.

**Section 602. Part II — Trespassing.** The Conference bill creates a new federal crime relating to misconduct concerning “special events of national significance.” It amends 18 U.S.C. 1752 to make it a federal crime to “willfully and knowingly to enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds so restricted in conjunction with an event designated as a special event of national significance,” proposed 18 U.S.C. 1752(a)(2). The bill provides no definition of “special event of national significance.” Nor is the term defined elsewhere in federal law, although it is used in 18 U.S.C. 3056 which authorizes the Secret Service to participate in the coordination of security arrangements for such activities.<sup>159</sup> The Conference report explains that the provisions relate to misconduct at events at which individuals under Secret Service protection are not attendees and by implication are not anticipated to be attendees.<sup>160</sup> This seems to raise questions about the constitutional basis upon which the other criminal prohibitions in section 1752 rely.

Congress and the federal government enjoy only those powers which the Constitution provides; all other powers are reserved to the states and to the people, U.S. Const. Amends. X, IX. The Constitution does not vest primary authority to enact and enforce criminal law in the federal government. The Constitution does grant Congress explicit legislative authority in three instances — treason, piracy and offenses against the law of nations, U.S. Const. Art.III, §3; Art.I, §8, cl.10. And it vests Congress with other more general powers which may be exercised through the enactment of related criminal laws, such as the power to regulate commerce or to enact laws for the District of Columbia, U.S. Const. Art.I, §8, cl.3, 17. Nevertheless, “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution,” *United States v. Morrison*, 529 U.S. 598, 607 (2000). It is not clear which of Congress’ enumerated powers individually or in concert supports under all circumstances the creation of a trespassing offense relating to “restricted areas” temporarily cordoned off or established for a “special event of national significance.”

<sup>159</sup> “(1) When directed by the President, the United States Secret Service is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President.

“(2) At the end of each fiscal year, the President through such agency or office as the President may designate, shall report to the Congress — (A) what events, if any, were designated special events of national significance for security purposes under paragraph (1); and (B) the criteria and information used in making each designation.” 18 U.S.C. 3056(e).

<sup>160</sup> H.Rept. 109-333, at 110 (2005)(“Section 602 of the conference report is a new section. 18 U.S.C. 1752 authorizes the Secret Service to charge individuals who breach established security perimeters or engage in other disruptive or potentially dangerous conduct at National Special Security Events (NSSEs) if a Secret Service protectee is attending [or will be attending] the designated event. Section 602 of the conference report expands 18 U.S.C. 1752 to criminalize such security breaches at NSSEs that occur when the Secret Service protectee is not in attendance [and will not be in attendance]”)(language in brackets added to reflect the current reach of section 1752 and the breadth of the proposed amendment).

Of course, the protection of such events under limited circumstances may fall within one or more of Congress' enumerated powers. For instance, Congress may enact a trespassing law protecting special events held in the District of Columbia by virtue of its power to enact laws for the District, U.S. Const. Art.I, §8, cl.17. Even here, however, the First Amendment may impose impediments when in a particular case the governmental interest in the special event is minimal and significant access restrictions are imposed on use of the streets or other public areas to prevent peaceful protest demonstrations.<sup>161</sup>

Interpretative regulations that limit the amendment's application to areas within the scope of Congress' legislative authority and consistent with the demands of the First Amendment offer the prospect of passing constitutional muster, but the bill repeals the subsection of 1752 which in amended form might authorize curative implementing regulations.<sup>162</sup>

**Section 603. Phony Passes.** Questions as to the source of Congress' legislative authority might also be raised about the bill's proposal to bring special event tickets and credentials within the folds of the statute that outlaws misuse of governmentally issued identification documents, 18 U.S.C. 1028. The structure of section 1028 makes the point more obviously than might otherwise be the case. In its present form, section 1028 prohibits eight particular varieties of unauthorized possession or trafficking in identification documents<sup>163</sup> when committed under one

<sup>161</sup> *Boos v. Barry*, 485 U.S. 312, 318 (1988) (“public streets and sidewalk” are “traditional public fora that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In such places, which occupy a special position in terms of First Amendment protection, the government’s ability to restrict expressive activity is very limited”) (internal quotation marks and citations omitted).

<sup>162</sup> “The Secretary of the Treasury is authorized — (1) to designate by regulations the buildings and grounds which constitute the temporary residences of the President or other person protected by the Secret Service and the temporary offices of the President and his staff or of any other person protected by the Secret Service, and (2) to prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President or other person protected by the Secret Service is or will be temporarily visiting,” 18 U.S.C. 1752(d). The authority vested in the Secretary of the Treasury passed to the Secretary of Homeland Security when the Secret Service was transferred to that Department, 6 U.S.C. 381. Of course, a conforming amendment to subsection 1752(d) would be required to implement the expanded “special event” area coverage.

<sup>163</sup> “Whoever, in a circumstance described in subsection (c) of this section — (1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document; (2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document was stolen or produced without lawful authority; (3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication feature, or false identification documents; (4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States; (5) knowingly produces, transfers, or possesses a document-making implement or authentication feature with the intent such document-making implement or

of three jurisdictional circumstances: the documents are issued or purport to be issued by a federal entity, the documents are used to defraud the United States, or the offense involves transportation in, or affects, interstate or foreign commerce, 18 U.S.C. 1028(a), (c).

The bill makes three changes in the scheme. First, it amends one of the eight prohibition subsections, that which outlaws unlawful possession of U.S. documents or facsimiles thereof, when committed under one of three jurisdictional circumstances. The change adds the documents of special event sponsors to the protected class, if the one jurisdictional predicates is satisfied.<sup>164</sup> Second, it amends the definition of “identification document” to include special events documents,<sup>165</sup> so that each of the other eight prohibition subsections applies as long as one of the three jurisdictional predicates is satisfied. Third, it amends one of the jurisdictional predicates, that which is based on issuance by a federal agency. It treats sponsors of special events as federal agencies within the jurisdictional subsection of section 1028(c).<sup>166</sup>

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authentication feature will be used in the production of a false identification document or another document-making implement or authentication feature which will be so used; (6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States which is stolen or produced without lawful authority knowing that such document or feature was stolen or produced without such authority; (7) knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or (8) knowingly traffics in false authentication features for use in false identification documents, document-making implements, or means of identification; shall be punished as provided in subsection (b) of this section,” 18 U.S.C. 1028(a).

<sup>164</sup> “Whoever, in a circumstance described in subsection (c) of this section. . . knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States *or a sponsoring entity of an event designated as a special event of national significance* which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority.. shall be punished as provided in subsection (b) of this section,” 18 U.S.C. 1028(a)(6)(proposed amendment in italics).

<sup>165</sup> “In this section . . . the term ‘identification document’ means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, *a sponsoring entity of an event designated as a special event of national significance* a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals,” 18 U.S.C. 1028(d)(3)(proposed amendment in italics).

<sup>166</sup> “The circumstance referred to in subsection (a) of this section is that — (1) the identification document, authentication feature, or false identification document is or appears to be issued by or under the authority of the United States *or a sponsoring entity of an event designated as a special event of national significance* or the document-making implement is designed or suited for making such an identification document, authentication feature, or false identification document,” 18 U.S.C. 1028(c)(1)(proposed amendment in italics)

It is this third amendment that raises the issue. There is no doubt that Congress has the constitutional power to enact legislation prohibiting possession or trafficking in special event identification documents, if the third jurisdictional predicate is satisfied, i.e., the offense involves transportation in, or affects, interstate or foreign commerce.<sup>167</sup> Nor is there any dispute Congress enjoys such authority, if the second jurisdiction predicate is satisfied, i.e., the offense involves defrauding the United States.<sup>168</sup> There may be a very real question, however, as to whether Congress may prohibit unlawful possession or trafficking in special event identification documents predicated solely upon the fact they were issued by a special event sponsor. “National significance” is not a term that by itself conjures up reference to any of Congress’ constitutionally enumerated powers. Legislation that cannot be traced to one or more of Congress’ enumerated powers lies beyond its reach, *United States v. Morrison*, 529 U.S. 598, 607 (2000).

**Section 604. Missing Children.** The PROTECT Act authorizes “officers and agents of the Secret Service” to provide state and local authorities and the National Center for Missing Exploited Children with investigative and forensic services in missing and exploited children cases, 18 U.S.C. 3056(f). Within the Secret Service, officers and agents conduct investigations, but employees provide forensic services. The Conference bill changes “officers and agents of the Secret Service” to simply “the Secret Service” to reflect this reality, proposed 18 U.S.C. 3056(f).

**Sections 605 and 606. Secret Service Uniformed Division.** The Conference bill amends and transfers the organic authority for the Secret Service Uniformed Division. The Conference report’s explanation is terse and in some respects curious:

Section 605 of the conference report is a new section. This section places all authorities of the Uniformed Division, which are currently authorized under title 3, in a newly created 18 U.S.C. §3056A, following the core authorizing statute of the Secret Service (18 U.S.C. §3056), thereby organizing the Uniformed Division under title 18 of the United States Code with other Federal law enforcement agencies. H.Rept. 109-333, at 111 (2005).

<sup>167</sup> “[M]odern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce,” *United States v. Morrison*, 529 U.S. 598, 608-609 (2000)(internal quotation marks and citations omitted); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

<sup>168</sup> “Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars,” *Sabri v. United States*, 541 U.S. 600, 605 (2004).

What makes the statement curious is that the organic authority for most federal law enforcement agencies is not found in title 18. For example, the Federal Bureau of Investigation (FBI) and the Marshals Service provisions appear not in title 18 but in title 28, 28 U.S.C. 531-540, 561-569; the Inspectors General Offices in appendices to title 5, 5 U.S.C. App. III; the Coast Guard in title 14, 14 U.S.C. chs.1-25; the Customs Service in title 19, 19 U.S.C. 2071-2083.

What is also somewhat curious is what is not said. There is no further explanation of the additions, modifications, deletions or apparent duplications associated with the transfer. Existing law lists a series of protective duties the Uniformed Division is authorized to perform, 3 U.S.C. 202. Although it is more geographically specific, it essentially reflects a similar list of some of the duties of the Secret Service as a whole found in 18 U.S.C. 3056.<sup>169</sup> The Conference bill adds four protective duties to the list: protection of former presidents and their spouses, protection of presidential and vice presidential candidates, protection of visiting heads of state, and security for special events of nation significance, proposed 18 U.S.C. 3056A(a)(10)-(13). All but the special event provisions are already part of the general Secret Service authority under section 3056 (18 U.S.C. 3056(a)(3),(7), (5)). The bill also explicitly authorizes members of the Division to carry firearms, make arrests under certain situations, and perform other duties authorized by law, proposed 18 U.S.C. 3056A(b)(1) — authority they are likely to already enjoy by operation of section 3056, 18 U.S.C. 3056(c)(1)(B), (C), (F), or by virtue of the fact they are vested with “powers similar to those of members of the Metropolitan Police of the District of Columbia,” 3 U.S.C. 202.

Unlike section 202 which is silent on the matter, the Conference bill specifically permits the Secretary of Homeland Security to contract out protection of foreign missions and foreign officials outside of the District of Columbia, proposed 18 U.S.C. 3056(d).

The bill also repeals 3 U.S.C. 203 (relating to personnel, appointment and vacancies), 204 (relating to grades, salaries, and transfers), 206 (relating to privileges of civil-service appointees), 207 (relating to participation in police and firemen’s relief fund),<sup>170</sup> and 208(b)(relating to authorization of appropriations).

**Section 607. Secret Service as a Distinct Entity.** The conference report statutorily declares the Secret Service a distinct entity within the Department of Homeland Security, reporting directly to the Secretary.<sup>171</sup>

<sup>169</sup> For example, while both 3 U.S.C. 202 and 18 U.S.C. 3056 authorize protection of the President, Vice President and their families, section 202 authorizes the Uniformed Division to protect the White House, any building housing presidential offices, the Treasury building and certain foreign diplomatic missions located outside of the District of Columbia, 3 U.S.C. 202.

<sup>170</sup> Section 606 of the Conference bill, however, states the changes do “not affect the retirement benefits of current employees or annuitants that existed on the day before the effective date of this Act.”

<sup>171</sup> “The United States Secret Service shall be maintained as a distinct entity within the Department of Homeland Security and shall not be merged with any other Department

**Section 608. Advisory Act Exceptions.** Major presidential and vice presidential candidates are entitled to Secret Service protection, 18 U.S.C. 3056(a)(7). The Secretary of Homeland Security identifies who qualifies as a “major” candidate and therefore is entitled to protection after consulting with advisory committee consisting of House Speaker and minority leader, the Senate majority and minority leader and fifth member whom they select, id. The Secret Service’s electronic crime task forces consist of federal and state law enforcement members as well as representatives from academia and industry who share information concerning computer security and abuse, 18 U.S.C. 3056 note.

The Federal Advisory Commission Act imposes notice, open meeting, record keeping, and reporting requirements on groups classified as federal advisory committees, 5 U.S.C. App. II. Advisory committees are committees, task forces, and other groups established by the statute, the President, or an executive agency “in the interest of obtaining advice and recommendations for” the President or federal agencies, 5 U.S.C. App. II 3(2). No group consisting entirely of officers or employees of the United States is considered an advisory committee for purposes of the act, id.

It is not clear that either the candidates protection committee or the electronic crimes task forces would be considered advisory committees for purposes of the act. Even if the committee were not exempt because it consists entirely of federal “officers or employees,” it seems highly unlikely that it is the type of committee envisioned by Congress when it enacted the act.<sup>172</sup> As for the task forces, it is not clear that their function is to provide advice and recommendations for agency action. In any event, the Conference bill exempts electronic crimes task forces and the candidates protection advisory committee from provisions of the Federal Advisory Committee Act, 18 U.S.C. 3056 note, 3056(a)(7).

## Title VII: Methamphetamine

**Section 701. Short Title.** The short title for Title VII is “Combating Methamphetamine Epidemic Act of 2005.”

### Subtitle VII A: Precursors.

Neither the House nor the Senate bill passed with a methamphetamine title in it; the conferees added Title VII, the Combat Methamphetamine Epidemic Act of 2005, to the act. Both Houses, however, had given considerable attention to the

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function. No personnel and operational elements of the United States Secret Service shall report to an individual other than the Director of the Untied States Secret Service, who shall report directly to the Secretary of Homeland Security without being required to report through any other official fo the Department,” 18 U.S.C. 3056(g).

<sup>172</sup> *Public Citizen v. Department of Justice*, 491 U.S. 440, 451-67(1989)(holding the act inapplicable to American Bar Association committee whose advice the Department sought regarding the qualifications of candidates for judicial appointment).

matters covered in Title VII.<sup>173</sup> In many of its particulars, Title VII resembles H.R. 3889, the Methamphetamine Epidemic Elimination Act, as amended by the House Committees on Energy and Commerce and on the Judiciary, H.Rept. 109-299 (pts. 1 & 2)(2005).<sup>174</sup> It contains subtitles concerning regulation of domestic and international commerce in three methamphetamine precursor chemicals: ephedrine, pseudoephedrine, and phenylpropanolamine (EPP); increased penalties for methamphetamine offenses; expanded environmentally related regulations; and adjusted grant programs.

**Sections 711-712. Sales Regulation — “Scheduled Listed Chemicals”.** The first part of the Title addresses the fact that certain cold and allergy medicines — widely and lawfully used for medicinal purposes and readily available in news stands, convenience stores, grocery stores, and drugstores — when collected in bulk can be used to manufacture methamphetamine. At the federal level, the Food and Drug Administration (FDA) regulates the commercial drug market to ensure the public of safe and effective medicinal products pursuant to the Federal Food Drug and Cosmetic Act, 21 U.S.C. 301-397. The Attorney General through the Drug Enforcement Administration regulates the commercial drug market with respect to drugs with a potential for addiction and abuse, pursuant to the Controlled Substances Act, 21 U.S.C. 801- 904, and the Controlled Substances Import and Export Act, 21 U.S.C. 951-971.

The degree of regulatory scrutiny afforded a particular drug classified as a controlled substance and sometimes certain of the chemicals essential for its production (precursor chemicals, also known as “list chemicals”) depends upon the drug’s potential for abuse weighed against its possible beneficial uses.<sup>175</sup> Those who lawfully import, export, produce, prescribe, sell or otherwise dispense drugs classified as controlled substances must be registered, 21 U.S.C. 958, 822. In the case of controlled substances susceptible to abuse and therefore criminal diversion and for certain of their precursor chemicals, the Attorney General may impose production and import/export quotas, security demands, inventory control measures, and extensive registration, record keeping and inspection requirements, 21 U.S.C. 821-830, 954-71. A wide range of civil and criminal sanctions, some of them quite severe, may be imposed for violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, or of the regulations promulgated for their implementation, 21 U.S.C. 841-863, 959-967.<sup>176</sup>

<sup>173</sup> Related CRS Reports include, CRS Report RS22325, *Methamphetamine: Legislation and Issues in the 109<sup>th</sup> Congress*, by Celinda Franco and CRS Report RS22177, *The Legal Regulation of Sales of Over-the-Counter Cold Medication*, by Jody Feder.

<sup>174</sup> In many respects, it is also compatible with S. 103 as reported by the Senate Committee on the Judiciary without written report.

<sup>175</sup> For example, the so-called “schedule I controlled substances” are those drugs that have “high potential for abuse,” that have “no currently accepted medical use in treatment in the United States,” and for which there are no “accepted safety for use . . . under medical supervision,” 21 U.S.C. 812(b)(1).

<sup>176</sup> See generally, CRS Report 97-141, *Drug Smuggling, Drug Dealing and Drug Abuse: Background and Overview of the Sanctions Under the Federal Controlled Substances Act and Related Statutes*, by Charles Doyle.

The Controlled Substances Act, in a dizzying array of criss-crossing exceptions and definitions, permits the over-the-counter sale, without regulatory complications, of cold remedies containing ephedrine, pseudoephedrine or phenylpropanolamine (EPP) — methamphetamine precursors — in packages containing less than 3 grams of EPP base (and in amounts not in excess of 9 grams of pseudoephedrine or phenylpropanolamine base per transaction).<sup>177</sup> Title VII eliminates the criss-crossing<sup>178</sup> and replaces it with a new regulatory scheme for “scheduled listed chemical products,” i.e., EPP products,<sup>179</sup> which:

- limits drugstore, convenience store, grocery store, news stand, lunch wagon (mobile retailer), and other retail sales of EPP products to 3.6 grams of EEP base per customer per day (down from 9 grams per transaction), proposed 21 U.S.C. 830(d), 802(46), 802(47);
- limits mobile retail sales to 7.5 grams of EPP base per customer per month, proposed 21 U.S.C. 830(e)(1)(A);
- insists that EPP products be displayed “behind the counter” (locked up in the case of mobile retailers), proposed 21 U.S.C. 830(e)(1)(A);
- (other than for sales involving 60 milligrams or less of pseudoephedrine) requires sellers to maintain a logbook (for at least two years) recording for every purchase, the time and date of sale, the name and quantity of the product sold, and name and address of the purchaser, proposed 21 U.S.C. 830(e)(1)(A);
- (other than for sales involving 60 milligrams or less of pseudoephedrine) demands that purchasers present a government-issued photo identification, sign the logbook for the sale noting their name and address, and the date and time of the sale, proposed 21 U.S.C. 830(e)(1)(A);

<sup>177</sup> All three chemicals are defined as “list I chemicals,” 21 U.S.C. 802(34)(C),(I),(K). List I and List II chemicals are defined as “listed chemicals,” 21 U.S.C. 802(33). Several of the act’s regulatory provisions apply to “regulated transactions” described as including the distribution, receipt, sale, import or export of listed chemicals, 21 U.S.C. 802(39)(A). Regulated transactions, however, do not include transactions involving FDA approved drugs, 21 U.S.C. 802(39)(A)(iv), unless the drug contains EPP (except “ordinary over-the-counter products” defined as products containing not more than 3 grams of an EPP base and unless in liquid form are packaged in blister packs where feasible, 21 U.S.C. 802(45)), 21 U.S.C. 802(39)(iv)(I)(aa), or unless the drug is one the Attorney General has determined is subject to diversion, 21 U.S.C. 802(39)(iv)(I)(bb), and the drug is one with a EPP base in amounts in excess of a threshold established by the Attorney General (except that the threshold for pseudoephedrine and phenylpropanolamine products may be no more than 9 grams of base per transaction and in packages containing no more than 3 grams of base), 21 U.S.C. 802(39)(iv)(II).

<sup>178</sup> Section 711 of the Conference bill replaces 20 U.S.C. 802(45); section 712 replaces 20 U.S.C. 802(39)(iv).

<sup>179</sup> The bill defines a “scheduled listed chemicals product” as one “that contains ephedrine, pseudoephedrine, or phenylpropanolamine” and “may be marketed or distributed lawfully in the United States under the Federal, Food Drug, and Cosmetic Act as a nonprescription drug,” proposed 21 U.S.C. 802(45)

- provides that the logbook must include a warning that false statements are punishable under 18 U.S.C. 1001 with a term of imprisonment of not more than five years and/or a fine of not more than \$250,000 (not more than \$500,000 for organizations), proposed 21 U.S.C. 830(e)(1)(A), 830(e)(1)(D);
- states that sellers must provide, document, and certify training of their employees on the EPP product statutory and regulatory requirements, proposed 21 U.S.C. 830(e)(1)(A), (B);
- directs the Attorney General to promulgate regulations to protect the privacy of the logbook entries (except for access for federal, state and local law enforcement officials), proposed 21 U.S.C. 830(e)(1)(C);
- affords sellers civil immunity for good faith disclosure of logbook information to law enforcement officials (unless the disclosure constitutes gross negligence or intentional, wanton, or willful misconduct), proposed 21 U.S.C. 830(e)(1)(E);
- requires sellers take measures against possible employee theft or diversion and preempts any state law which precludes them asking prospective employees about past EPP or controlled substance convictions, proposed 21 U.S.C. 830(e)(1)(G);
- sets September 30, 2006 as the effective date for the regulatory scheme (but the 3.6 gram limit on sales would become effective 30 days after enactment).

Existing law imposes monthly reporting requirements on mail order sales of EPP products, 21 U.S.C. 830(b)(3). Under the Conference bill those subject to the reporting requirement must confirm the identity of their customers under procedures established by the Attorney General, and sales are limited to 7.5 grams of EPP base per customer per month, proposed 21 U.S.C. 830(e)(2). If the Attorney General determines that an EPP product cannot be used to produce methamphetamine, he may waive the 3.6 gram limit on retail sales and 7.5 gram limits on mail order and mobile retail sales, proposed 21 U.S.C. 830(e)(3).

Sellers who knowingly violate the mail order regulations, or knowingly or recklessly violate the sales regulations, or unlawfully disclose or refuse to disclose EPP logbook sales information, or continue to sell after being prohibited from doing so as a result of past violations, are subject to imprisonment for not more than one year, and/or a fine of not more than \$100,000 (not more than \$200,000 for organizations), and to a civil penalty of not more than \$25,000, proposed 21 U.S.C. 842. During the 30 days after enactment but before the new purchase limits become effective, knowing or intentional retail purchases more than 9 grams of EPP base (7.5 grams in the case of mail order purchases) are punishable by imprisonment for not more than one year and/or a fine of not less than \$1,000 nor more than \$100,000 (not more than \$200,000 for an organization), proposed 21 U.S.C. 844(a).

**Sections 713-714. Production Quotas.** The Controlled Substances Act allows the Attorney General to assess the total annual requirements for various controlled substances and to impose manufacturing quotas accordingly, 21 U.S.C. 826. The Conference bill extends that authority to reach EPP production, proposed 21, U.S.C. 826. For violations, manufacturers face imprisonment for not more than one year, and/or a fine of not more than \$100,000 (not more than \$200,000 for

organizations), and to a civil penalty of not more than \$25,000, proposed 21 U.S.C. 842.

**Sections 715-718. Imports/Exports.** The Attorney General enjoys broad general authority to regulate controlled substances imported and exported for legitimate purposes, 21 U.S.C. 952, 953 (neither section mentions listed chemicals). Importers and exporters of list I chemicals (which includes EPP), however, must register with the Attorney General, 21 U.S.C. 958. And they must notify the Attorney General 15 days in advance of any anticipated shipment of listed chemicals to or from the U.S. involving anyone other than a regular source or customer, 21 U.S.C. 971.

The Conference bill expands the statutory statement of the Attorney General's authority to regulate controlled substance imports to include EPP, proposed 21 U.S.C. 952. Moreover, it provides implicit statutory confirmation of the Attorney General's authority to set import quotas for EPP by authorizing him to increase the quantity of chemicals importer's registration permits him to bring into the country, proposed 21 U.S.C. 952(d). Here and its other adjustments concerning imports and exports, the Conference bill instructs the Attorney General to confer with the U.S. Trade Representative in order to ensure continued compliance with our international trade obligations.

### **Subtitle VII B: International Regulation of Precursors.**

**Section 721. Foreign Distribution Chains.** The Conference bill also affords the Attorney General renewed notification when the listed chemical transaction, for which approval was initially sought and granted, “falls through,” and the importer or exporter substitutes a new subsequent purchaser, proposed 21 U.S.C. 971.<sup>180</sup> The Attorney General may require EPP importers to include “chain of distribution” information in their notices that traces the distribution trial from foreign manufacturers to the importer, proposed 21 U.S.C. 971(h). The Attorney General may seek further information from foreign participants in the chain and refuse to approve transactions involving uncooperative participants, proposed 21 U.S.C. 971(h)(2), (h)(3). Failure to comply with these expanded notice requirements or the bills’s EPP import registration and quota provisions is punishable by imprisonment for not more than 10 years and /or a fine of not more than \$250,000 (not more than \$500,000 for organizations), proposed 21 U.S.C. 960(d)(6).

**Sections 722-723. Foreign Assistance to Source Countries.** The Foreign Assistance Act calls for an annual report on the drug trafficking and related money laundering activities taking place in countries receiving assistance, 22 U.S.C.

<sup>180</sup> H.Rept. 109-333 (2005) (“A problem can arise, however, when the sale that the importer or exporter originally planned falls through. When this happens the importer or exporter must quickly find a new buyer for the chemicals on what is called the “spot market”—wholesale market. Sellers are often under pressure to find a buyer in a short amount of time, meaning that they may be tempted to entertain bids from companies without a strong record of preventing diversion. More importantly, the Department of Justice has no opportunity to review such transactions in advance and suspend them if there is a danger of diversion to illegal drug production”).

2291h. Major illicit drug-producing and drug-transit countries are subject to a procedure featuring presidential certification of cooperative corrective efforts, 22 U.S.C. 2291j. The Conference bill amends the reporting and certification requirements to cover the five largest EPP exporting and the five largest EPP importing countries with the highest rates of diversion, proposed 22 U.S.C. 2291h, 2291j.<sup>181</sup> It also directs the Secretary of State in consultation of the Attorney General to report to Congress on a plan to deal with the diversion. The Secretary is further instructed to take diplomatic action to prevent methamphetamine smuggling from Mexico into the United States and to report to Congress on results of the efforts.

### **Subtitle VII C: Enhanced Penalties.**

**Section 731. Smuggling Using Commuter Lanes.** Unlawful possession of methamphetamine is punishable by imprisonment for terms ranging from not more than 20 years to imprisonment for life depending upon the amount involved and the offender's criminal record, 21 U.S.C. 841(b), 848. Unlawful possession of EPP is punishable by imprisonment for terms ranging from not more than five years to imprisonment for life depending upon the amount involved and the offender's criminal record, 21 U.S.C. 841(c), 848. Similar penalties follow smuggling methamphetamine or EPP, 21 U.S.C. 960, 848. The Conference bill establishes a consecutive term of imprisonment of not more than 15 years to be added to the otherwise applicable sentence when the methamphetamine or EPP offense is committed in connection with quick entry border procedures.

**Section 732. Cooking on Federal Property.** The fines for controlled substance offenses that involve *cultivation* of a controlled substance on federal property are not more than \$500,000 individuals and \$1 million for organizations, 21 U.S.C. 841(b)(5). The Conference bill establishes the same fine levels for *manufacturing* a controlled substance on federal property, proposed 21 U.S.C. 841(b)(5).<sup>182</sup>

**Section 733. Drug King-Pins.** The Controlled Substances Act punishes major drug traffickers (those guilty of continuing criminal enterprise offenses sometimes known as "drug king-pins"), 21 U.S.C. 848. Drug king-pins, whose offenses involve *300 or more times* the amount of controlled substance necessary to trigger the sentencing provisions of 21 U.S.C. 841(b)(1)(B) or whose offenses generate more than *\$10 million* in gross receipts a year, face sentences of mandatory life imprisonment. In the case of a drug king-pin trafficking in methamphetamine, the Conference bill lowers the thresholds to *200 or more times* the trigger amounts or *\$5 million* in gross receipts a year, proposed 21 U.S.C. 848(s).

**Section 734: Cooking or Dealing Near Children.** The Controlled Substances Act doubles the otherwise applicable penalties for the distribution or

<sup>181</sup> Similar provisions appear in the House-passed Foreign Relations Authorization Act, Fiscal Years 2006 and 2007 (H.R. 2601)(\$1007).

<sup>182</sup> It is not clear why the amended provision refers to "cultivating or manufacturing," rather than simply "manufacturing" when for purposes of the Controlled Substances Act, "manufacturing" includes "cultivating," 21 U.S.C. 802(15), (22).

manufacture of controlled substances near schools, playgrounds, video arcades and other similarly designated places likely to be frequented by children, 21 U.S.C. 860. The Conference bill adds a penalty of imprisonment for not more than 20 years to the otherwise applicable penalties for distributing, possessing with the intent to distribute, or manufacturing methamphetamine anywhere where a child under 18 years of age is in fact present or resides, 21 U.S.C. 860a.

**Section 735. Reports to the Sentencing Commission.** The United States Sentencing Commission establishes and amends federal sentencing guidelines, which must be considered when federal courts impose sentence in a criminal case, 28 U.S.C. 994; 18 U.S.C. 3553; *United States v. Booker*, 125 S.Ct. 738, 757 (2005). Every federal judicial district must provide the Commission with detailed reports on each criminal sentence imposed by the district's judges, 28 U.S.C. 994(w). The Conference bill authorizes the Commission to establish the forms for such reports and emphasizes the need for a written statement of reasons for the sentence imposed including the reasons for any departure from the sentence advised by the guidelines, proposed 28 U.S.C. 994(w).

**Section 736. Reports to Congress.** The bill also requires the Attorney General to report twice a year — to the Judiciary Committees; the House Energy and Commerce Committee; the Senate Commerce, Science and Transportation Committee; the House Government Reform Committee; and the Senate Caucus on International Narcotics Control — on the Drug Enforcement Administration's and the Federal Bureau of Investigation's allocation of resources to the investigation and prosecution of methamphetamine offenses.

#### **Subtitle VII D: Enhanced Cleanup Regulation.**

**Section 741. Transportation of Hazardous Materials.** Under the Hazardous Material Transportation Act, the Secretary of Transportation enjoys regulatory authority over the transportation of certain explosive, toxic or otherwise hazardous material, 49 U.S.C. 5103. The Conference bill instructs the Secretary to report every two years to the House Committee on Transportation and Infrastructure and to the Senate Committee on Commerce, Science, and Transportation on whether he has designated as hazardous materials for purposes of the act, all methamphetamine production by-products, proposed 49 U.S.C. 5103(d).

**Section 742. Solid Waste Disposal.** Under the Solid Waste Disposal Act, the Administration of the Environmental Protection Agency identifies and lists toxic, flammable, corrosive and otherwise hazardous waste, 42 U.S.C. 6921. The bill requires the Administrator to report within two years of enactment, to the House Committee on Energy and Commerce and the Senate Committee on Environment and Public Works, on the information received from law enforcement agencies and others identifying the by-products of illicit methamphetamine product and on which of such by-products the Administrator considers hazardous waste for purposes of the act, 42 U.S.C. 6921(j).

**Section 743. Restitution for Methamphetamine Possession.** The Conference bill amends the provision, under which offenders convicted of violations of the Controlled Substances Act or the Controlled Substances Import and Export

Act involving the manufacture of amphetamine or methamphetamine may be ordered pay restitution and to reimburse governmental entities for cleanup costs, to specifically include restitution and reimbursement in the case of offenses involving simple possession or possession with intent to distribute, 21 U.S.C. 853(q).<sup>183</sup> *United States v. Lachowski*, 405 F.3d 696, 700 (8<sup>th</sup> Cir. 2005), held that the “offenses involving the manufacture of amphetamine or methamphetamine” upon which a restitution or reimbursement order might be based did not include unlawful possession with intent to distribute methamphetamine. The conferees felt that *Lachowski* “undermined the ability of the Federal government to seek cleanup costs from methamphetamine traffickers who are convicted only of methamphetamine possession — even when the methamphetamine lab in question was on the defendant’s own property,” H.Rept. 109-333, at 116.

### **Subtitle VII E: Drug Courts and Grant Programs.**

**Sections 751-753. Drug Courts.** The Attorney General may make grants to state, local and tribal governments for the operation of drug courts, 42 U.S.C. 3797u. The Conference bill instructs the Attorney General to prescribe guidelines or regulations to ensure that such programs feature mandatory drug testing and mandatory graduated sanctions for test failures, proposed 42 U.S.C. 3797u(c), and authorizes appropriations for FY2006 of \$70 million, proposed 42 U.S.C. 3793(25)(A)(v)[inadvertently cited as 42 U.S.C. 2591(25)(A)(v)]. The Attorney General is also directed to study the feasibility of a drug court program for low-level, non-violent federal offenders and to report on the results by June 30, 2006.

**Sections 754-756. Grant Programs.** The conferees also agreed to create three methamphetamine-related grant programs. One, section 754 of the Conference bill, addresses public safety as well as methamphetamine manufacturing, trafficking and use in “hot spots.” Appropriations of \$99 million for each of the next five fiscal years (2006-2010) are authorized for grants to the states under the program. The second, section 755 of the Conference bill, authorizes appropriations of \$20 million for fiscal years 2006 and 2007 in order to provide grants to the states for programs for drug-endangered children. The third program (services relating to methamphetamine use by pregnant and parenting women offenders), section 756 of the Conference bill, is available to state, local, and tribal governments and supported an authorization of such appropriations as are necessary.

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<sup>183</sup> “The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, *the possession, or the possession with the intent to distribute*, of amphetamine or methamphetamine, shall — (1) order restitution as provided in sections 3612 and 3664 of Title 18; (2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, *or on premises or in property that the defendant owns, resides, or does business in*; and (3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18,” 21 U.S.C. 853(q)(Conference bill amendments in italics).